FILE COPY

FILED
APR 24 1944
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1943

No. 767

INTERSTATE COMMERCE COMMISSION and HUDSON & MANHATTAN RAILROAD COMPANY,

Appellants,

vs.

CITY OF JERSEY CITY and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLANT HUDSON & MANHATTAN RAILROAD COMPANY

JOHN F. FINERTY,
Counsel for Appellant, Hudson & Manhattan Railroad Company.

JOHN E. BUCK,
THOMAS A. HALLERAN,
CRAVATH, SWAINE & MOORE,
Of Counsel.

INDEX

	PAGE
Introduction	1
Opinions Below	3
Jurisdiction	3
Statutes Involved	4
Statement of the Case	5
History of the proceedings before the Commission and the Courts in relation to the Commission's enjoined orders of June 8 and November 2, 1943	7
(1) Prior proceedings before the Commission and the Courts, 1937-1942	7
(2) Proceedings before the Commission and the Courts in relation to the Commission's enjoined orders of June 8 and November 2, 1943	10
(a) Proceedings before the Commission resulting in the order of June 8, 1943	10
(b) Proceedings before the Commission resulting in the order of August 3, 1943, modifying the order of June 8, 1943	12
(c) Proceedings before the District Court in relation to the order of August 3, 1943	19
(d) Further proceedings before the Commission resulting in the order of November 2, 1943, affirming modification of the order of June 8, 1943, by order of August 3, 1943	21
(e) Proceedings before the District Court in relation to the orders of June 8, 1943, and November 2, 1943	33
(f) Rulings below	35
Specification of Assigned Errors Intended to be Urged	39
Summary of Argument	40

ARGUMENT

PAGE

I. The injunction issued by the District Court against the Commission's orders of June 8, 1943, and November 2, 1943, on the wholly specious ground that such orders deprived the appellees of a full and fair hearing, was an unjustifiable interference with the Commission's attempt, in a proper exercise of its administrative discretion, to correct its own error 46

A. The Commission properly exercised its administrative discretion in limiting the further hearing granted by its order of September 18, 1943 solely to the receipt of evidence as to the impracticability of appellant's collecting a 9 cent cash fare..... 50

B. The Commission further properly exercised its administrative discretion in declining to grant the Price Administrator's motion of October 14, 1943 for further hearing to permit the introduction of evidence tendered in that motion to show that appellant was entitled to no increase whatever in its present 8 cent fare on its downtown line.. 52

II. Appellees' tendered evidence was irrelevant and incompetent for the express and sole purpose for which it was tendered..... 56

A. The Commission could not legally have limited appellant to such fares as would yield merely appellant's current bond interest. Appellant is legally entitled to charge such just and reasonable fares as would enable appellant to earn, as nearly as may be, in view of the competition of other forms of transportation, a fair return on the value of its railroad properties. The

PAGE

District Court did not find, nor did appellees contend, that appellant's present 8 cent fare would yield, or the enjoined fares exceed, such fair return 61

B. The Commission could not legally have limited, nor did it intend to limit, appellant merely to the revenues which the Commission, in its reports of July 11, 1938 and June 8, 1943, estimated appellant would earn under the 8 cent and 9 cent fares there respectively authorized 67

III. Jersey City was estopped both from asking the Commission to receive the tendered evidence and from seeking and obtaining an injunction from the District Court based on the Commission's refusal to receive such evidence.

Interwoven with, and in reality a part of such estoppel, was Jersey City's total failure to exhaust its administrative remedies before the Commission 73

IV. The Price Administrator, having not only failed to offer any evidence whatever before the Commission that the increased fares authorized by the enjoined orders would result in inflation, but having expressly conceded to the contrary, the Commission's refusal to receive the evidence tendered by the Price Administrator, to show that because of appellant's increased 1943 revenues the Commission was not warranted in permitting any increase whatever over appellant's present 8 cent fare, could not constitute a denial of full and fair hearing to the Price Administrator, or warrant the District Court on that ground in enjoining the Commission's orders.

PAGE

The District Court was likewise unwarranted in enjoining the Commission's orders on the ground that the Commission had "lightly brushed aside" the contention of the Price Administrator that the increased fares thereby authorized violated the national emergency policy of economic stabilization 82

V. The Commission's orders of June 8, 1943, and November 2, 1943, are fully supported by the findings of the Commission which, in turn, are fully supported by substantial evidence in the record 88

A. The report and order of June 8, 1943 91

B. The report and order of November 2, 1943 .. 96

Conclusion 107

APPENDIX 1

Interstate Commerce Act i

Emergency Price Control Act of 1942 ii

Inflation Control Act (Stabilization Act) of 1942 iii

Interstate Commerce Commission, Rules of General Practice, Rule 101 iv

APPENDIX 2

Description of Appellant's Railroad vi

TABLE OF CASES

PAGE

Acker v. *United States*, 298 U. S. 426, 433 ..... 55, 108
American Toll Bridge Co. v. *Railroad Commission*, 307 U. S. 486, 494 51
Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 284 U. S. 248 55

Baltimore and Ohio R. Co. v. *United States*, 298 U. S. 349, 389 55
Board of Public Utility Commissioners of N. J. v. *U. S.*, 21 F. Supp. 543 77

Dayton Power & Light Co. v. *Public Utilities Commission*, 292 U. S. 290, 299 55

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-3 51
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591, 602, 615 ..... 55, 91, 108
Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575 55
Florida v. *United States*, 282 U. S. 194, 215 89

Hudson & Manhattan Railroad Co. v. *United States et al.*, 313 U. S. 98 ..... 3, 9, 89, 103
Hudson & Manhattan Railroad Co. v. *United States et al.*, 33 Fed. Supp. 495 ..... 3, 9

Illinois Commerce Commission v. *United States*, 292 U. S. 474, 481 55
Increased Railway Rates, Fares, and Charges, 1942, 248 I. C. C. 545 95
Interstate Commerce Commission v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 92 89
Interstate Commerce Commission v. *Union Pacific R. Co.*, 222 U. S. 541, 546, 547-548, 550 ..... 88, 90

PAGE

Lindheimer v. *Illinois Bell Tel. Co.*, 292 U. S. 151, 163, 164 55
Local Fares of the Hudson & Manhattan Railroad Company, 58 I. C. C. 270..... 8
Los Angeles Gas & Electric Corp. v. *Railroad Commission*, 289 U. S. 287, 307, 310, 311, 319..... 55

Manufacturers Ry. Co. v. *United States*, 246 U. S. 457, 482 49
Myers v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-51..... 76

Passenger Fares of Hudson & Manhattan Railroad, 227 I. C. C. 741.....2, 3, 8
Passenger Fares of Hudson & Manhattan Railroad, 255 I. C. C. 649..... 1, 3
Passenger Fares of Hudson & Manhattan Railroad, 256 I. C. C. 507..... 1, 3
Passenger Fares and Surcharges, 214 I. C. C. 174, 257 18
Philadelphia Coke Company v. *Bowles*, United States Emergency Court of Appeals, December 15, 1943.. 37
Pittsburgh Plate Glass Company v. *N. L. R. B.*, 313 U. S. 146, 163..... 56
Public Service Commission of Montana v. *Great Northern Utilities Company*, 289 U. S. 130..... 63

Railroad Commission v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 397, 398..... 55

United States v. *New River Co.*, 265 U. S. 533, 542.. 88
United States v. *Northern Pacific Ry. Co.*, 288 U. S. 490, 494 55

Vinson et al. v. *Washington Gas Light Company et al.*, U. S. , decided March 27, 1944.....37, 84
Virginian Ry. Co. v. *United States*, 272 U. S. 658, 666 88

PAGE

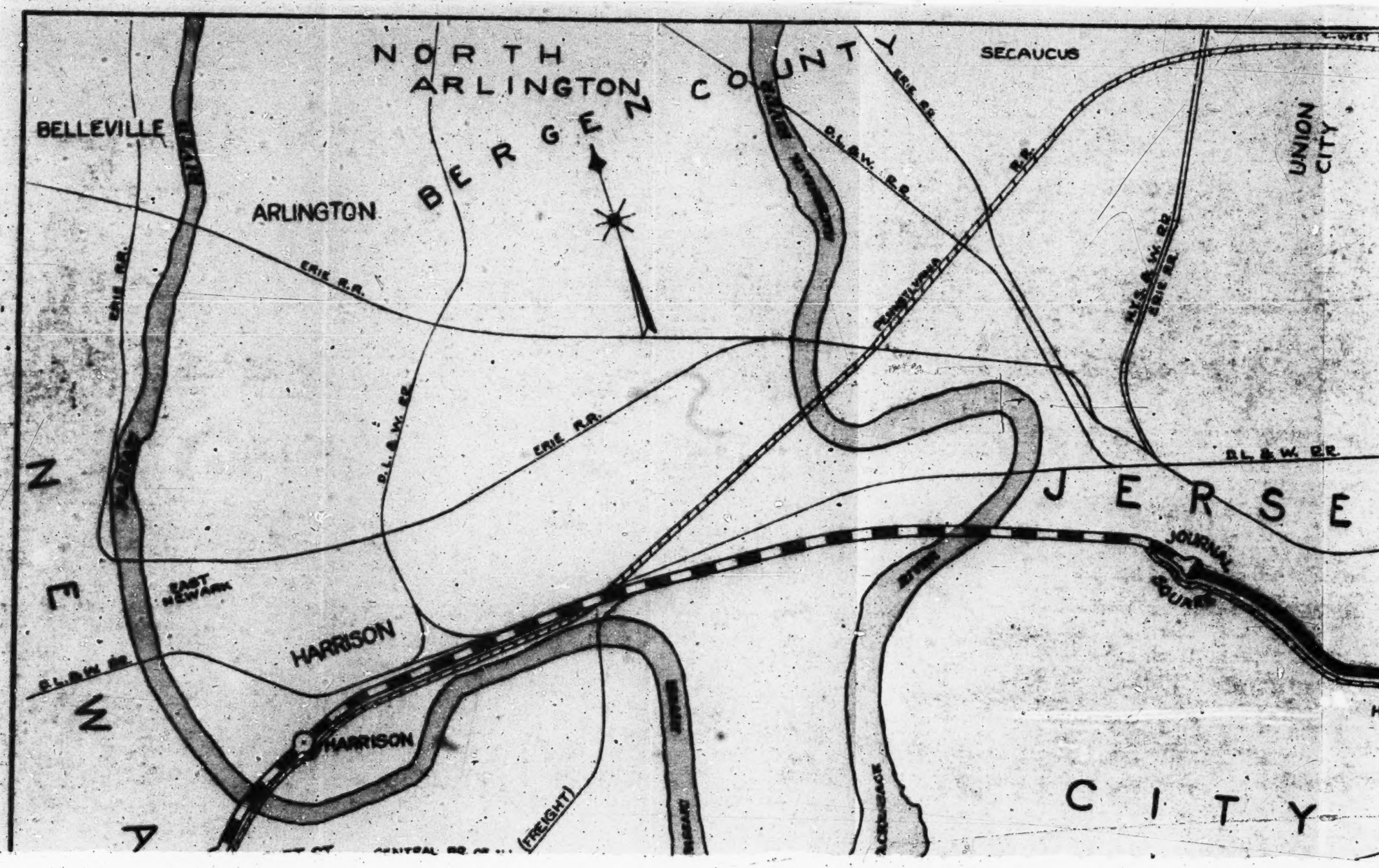
Washington Gas Light Company v. *Byrnes*, 137 F. (2d) 547 37
Western Chemical Co. v. *United States*, 271 U. S. 268, 271 88

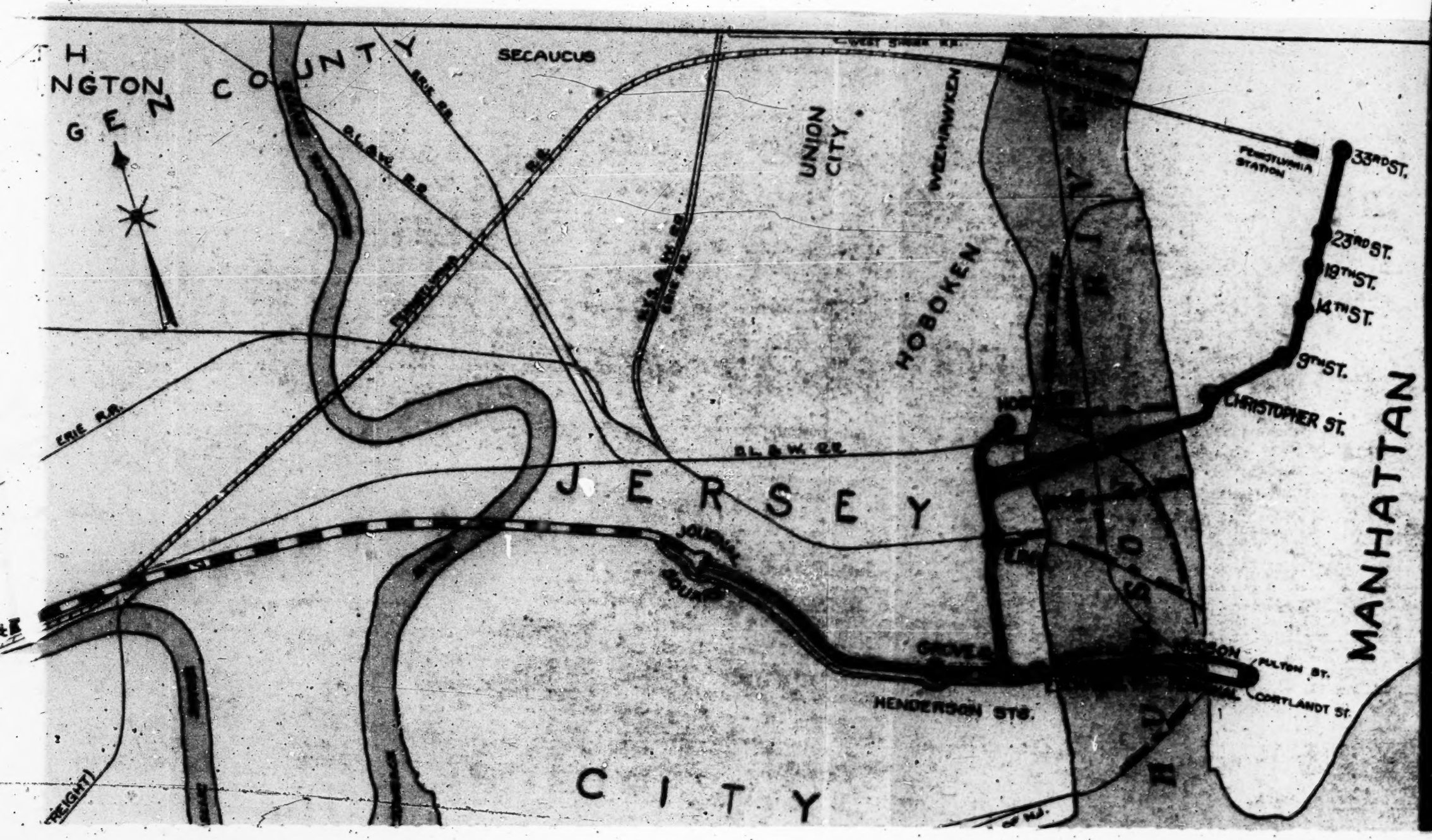
STATUTES INVOLVED

Interstate Commerce Act 4
Emergency Price Control Act of 1942 5
Inflation Control Act (Stabilization Act) of 1942 ... 5

OTHER AUTHORITY

Interstate Commerce Commission, General Rules of Practice, Rule 101 ..... 14, 16, 24, 26, 36, 54, 61, 75


NORTH ARLINGTON
BERGEN COUNTY
SECAUCUS
BELLEVILLE
ARLINGTON
UNION CITY
ERIE R.R.
D.L.&W. R.R.
PENNSYLVANIA R.R.
N.Y.S.&W. RY.
ERIE R.R.
D.L.&W. R.R.
ERIE R.R.
D.L.&W. R.R.
NEW JERSEY
EAST NEWARK
HARRISON
HARRISON
JOURNAL SQUARE
HACKENSACK RIVER
HACKENSACK RIVER
(FREIGHT)
CITY


H
NGTON
GEN
COUNTY
SECAUCUS
ERIE R.R.
D.L.&W. R.R.
P.R.R.
UNION CITY
WEEHAWKEN
HOBOKEN
WEST SHORE R.R.
ERIE R.R.
D.L.&W. R.R.
PENNSYLVANIA STATION
33RD ST.
23RD ST.
19TH ST.
14TH ST.
9TH ST.
CHRISTOPHER ST.
HUDSON
TUBES
MANHATTAN
ERIE R.R.
D.L.&W. R.R.
JERSEY
JOURNAL SQUARE
GROVE ST.
HENDERSON STS.
FULTON ST.
CORTLANDT ST.
CITY
HUDSON
TUBES
FREIGHT

Supreme Court of the United States

OCTOBER TERM, 1943

INTERSTATE COMMERCE COMMISSION and HUDSON & MANHATTAN RAILROAD COMPANY, *Appellants,* vs. CITY OF JERSEY CITY and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Appellees.*[1]	No. 767

BRIEF FOR APPELLANT HUDSON & MANHATTAN RAILROAD COMPANY

This is a joint appeal by the Interstate Commerce Commission and the Hudson & Manhattan Railroad Company from a final order and decree of the District Court of the United States for the District of New Jersey entered January 14, 1944, setting aside, annulling and perpetually enjoining two orders of the Interstate Commerce Commission of June 8, 1943 and November 2, 1943, respectively, in I. & S. Docket No. 4394, *Passenger Fares of Hudson & Manhattan Railroad* (255 I. C. C. 649; 256 I. C. C. 507), insofar as said orders permitted the establishment of a local interstate fare in excess of 8 cents for transportation

[1]The appellees will herein be referred to respectively as "Jersey City" and as the "Price Administrator".

on the downtown line of appellant Hudson & Manhattan Railroad Company, and further ordering and decreeing that such proceedings be remanded to the Interstate Commerce Commission for further hearing and reconsideration in accordance with the views expressed in the opinion of the District Court.

The Commission's enjoined order of June 8, 1943[1] authorized appellant Hudson & Manhattan Railroad Company to charge, as a maximum, a 9 cent fare on its downtown line instead of the present 8 cent fare authorized by the Commission's order of July 11, 1938 (227 I. C. C. 741).[2]

The Commission's enjoined order of November 2, 1943[3] authorized said appellant to charge as a maximum, in lieu of the 9 cent fare previously authorized, alternative fares of 11 tokens for a $1 or a cash fare of a dime, provided, however, that such alternative fares should also be made applicable to said appellant's uptown line, upon which the authorized and existing fare was and is 10 cents. This order was expressly made by the Commission as the only practical means of correcting its frankly acknowledged error in overlooking evidence already before it prior to its order of June 8, 1943, that it would be impracticable for appellant to collect a 9 cent *cash* fare because of the physical limitations, which could not be obviated, of appellant's fare collection boxes.

Both orders limited such increased fares to the duration of the war and six months thereafter.

Said District Court, prior to its order here appealed from granting a permanent injunction against the Com-

---

[1]R. 248-272.
[2]R. 286-312.
[3]R. 272-285.

mission's orders, had, on November 26, 1943, granted an interlocutory injunction against such orders.[1] A separate appeal by the appellant Hudson & Manhattan Railroad Company from the order granting this interlocutory injunction was taken to this Court as No. 766, October Term, 1943, and was dismissed by the order of this Court of April 3, 1944.

OPINIONS BELOW

The majority[2] and minority[3] opinions of the Court below were rendered January 14, 1944, but have not yet been officially reported.

The enjoined reports and orders of the Interstate Commerce Commission of June 8, 1943 and November 2, 1943 are respectively reported in 255 I. C. C. 649 and 256 I. C. C. 507.

The present 8 cent fare on appellant's downtown line was before this Court in *Hudson & Manhattan Railroad Co.* v. *United States et al.*, 313 U. S. 98, in which this Court affirmed the dismissal by the District Court (33 Fed. Supp. 495) of appellant Railroad Company's application for a permanent injunction against the Commission's order of July 11, 1938 (227 I. C. C. 741) limiting appellant to such 8 cent fare instead of the 10 cent fare published by appellant and suspended by the Commission.

JURISDICTION

This being an appeal from a decree and order of a statutory court permanently enjoining orders of the Inter-

[1] R. 116-118.
[2] R. 194-201.
[3] R. 201-205.

state Commerce Commission, the jurisdiction of this Court is invoked under:

U. S. C. Title 28, Section 47a [Act of March 3, 1911, c. 231, Sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220].

U. S. C. Title 28, Section 41(28) [Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219].

U. S. C. Title 28, Section 44 [Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938].

U. S. C. Title 28, Section 47 [Act of October 22, 1913, c. 32, 38 Stat. 220].

U. S. C. Title 28, Section 345 [Act of March 3, 1891, c. 517, Sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Sec. 35, 31 Stat. 85; April 30, 1900, c. 339, Sec. 86, 31 Stat. 158; March 3, 1909, c. 269, Sec. 1, 35 Stat. 838; March 3, 1911, c. 231, Secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Sec. 2, 38 Stat. 804, February 13, 1925, c. 229, Sec. 1, 43 Stat. 938].

STATUTES INVOLVED

No question is involved of the validity of a statute of a state or of a statute or treaty of the United States. There is, however, involved the construction of the following statutes of the United States, applicable provisions of which are set forth in Appendix 1:

Interstate Commerce Act (Sections 1(1), 1(5) and 15a, Title 49, Chapter 1, U. S. C.).

Emergency Price Control Act of 1942 (Act Jan. 30, 1942, Title 50, U. S. C., Secs. 901 *et seq.*).

Inflation Control Act (Stabilization Act) of 1942 (Act Oct. 2, 1942, Title 50, U. S. C., Secs. 961 *et seq.*).

STATEMENT OF THE CASE

The majority below, by basing their injunction on a wholly specious finding that the Commission has denied appellees a full and fair hearing, have in reality undertaken to prevent the Commission from exercising its proper administrative discretion in two respects:

First: By holding that the Commission could not correct its frankly acknowledged error in its order of June 8, 1943 in limiting the increase in appellant's existing 8 cent fare to an uncollectible 9 cent *cash* fare, by granting on its own motion a further hearing confined solely to the receipt of evidence as to the necessity for and the manner of correcting such error, without reopening the whole question of appellant's right to any increase whatever in its present 8 cent fare and receiving evidence tendered by appellees in this respect.

Second: By holding that the Commission could not, on consideration of a tardy petition for still further hearing to receive such tendered evidence, determine whether such evidence, if received, would require any change in the Commission's prior orders authorizing increases in appellant's present 8 cent fare and, having determined to the contrary, still could not deny a further hearing to receive such evidence even though its receipt would be entirely futile.

This specious finding of a denial of a full and fair hearing is the first and major ground stated in the majority opinion for its improvident injunction, preventing the Com-

mission from correcting its acknowledged error, and thereby depriving appellant of needed revenues in excess of $1,000 per day which, but for the Commission's error and the injunction preventing its correction, appellant would have received since July, 1943.

The only other ground stated by the majority is equally specious. It is that the Commission, in making its enjoined orders authorizing such increased fares "lightly brushed aside" the contention of the Price Administrator that such increased fares violated the national emergency policy of economic stabilization. It will later be shown that although the Price Administrator had neither introduced nor attempted to introduce before the Commission a word of evidence in this respect, the Commission not only considered but elaborately discussed such contention of the Price Administrator.

Essentially frivolous as are both these grounds, they necessitate, nevertheless, a somewhat lengthy analysis of the record[1] relating to the proceedings before the Commis-

---

[1]In order to permit this appeal to be heard at the current term of this Court, the parties stipulated (R. 417-433) to omit from the printed Transcript of Record before this Court certain of the documents transmitted to this Court as part of the original record before the District Court, including the transcript of the proceedings before the Interstate Commerce Commission involved on this appeal, introduced as Exhibit P-1 at the hearings before the District Court, and certain other exhibits introduced at such hearings before the District Court. Such transcript of proceedings before the Interstate Commerce Commission (Exhibit P-1 at the hearings before the District Court) comprises, in addition to the transcript of the stenographic notes of the hearings held before the Commission, various exhibits filed at said hearings. In this brief references to the printed Transcript of Record on the present appeal are designated as "R. ", references to the transcript of the stenographic notes of the hearings held before the Interstate Commerce Commission are designated as "Tr. ", refer-

sion and the courts. Such analysis is necessary for two reasons: first, to make clear that the Commission's enjoined orders were made by it only after full and extensive hearings, including the introduction by all parties of elaborate evidence, the filing of briefs, the consideration of exceptions, and the making of oral argument; second, to make clear the basis on which appellant submits that the appellees were without standing to obtain injunctive relief, by reason *inter alia* of certain estoppels arising against them, interwoven with their failure to exhaust their administrative remedies.

History of the proceedings before the Commission and the Courts in relation to the Commission's enjoined orders of June 8 and November 2, 1943.

(A map of appellant's railroad appears opposite page 1 of this brief. To avoid obscuring the analysis of the record with relation to the basic questions involved on this appeal, the description of appellant's railroad and of its transportation services is deferred to Appendix 2.)

(1) Prior proceedings before the Commission and the Courts, 1937-1942

On July 31, 1937, appellant published and filed with the Commission its local passenger tariff I. C. C. No. 42, to

---

ences to the exhibits filed at the hearings before the Interstate Commerce Commission are designated as "Tr. Ex. ", and references to the exhibits introduced at the hearings before the District Court which are not included in the printed Transcript of Record are designated as "Ex. P. ", in the case of exhibits introduced by Jersey City, as "Int. Ex. ", in the case of exhibits introduced by the Price Administrator, as "H. & M. Ex. D. ", in the case of exhibits introduced by the appellant, and as "I. C. C. Ex. D. ", in the case of exhibits introduced by the Interstate Commerce Commission.

become effective September 1, 1937, establishing a 10 cent fare for the interstate transportation of passengers on appellant's downtown line, in lieu of its then fare of 6 cents which had been authorized by the Commission's report and order of August 9, 1920, in *Local fares of the Hudson & Manhattan Railroad Company,* 58 I. C. C. 270. On the petition of Jersey City and other protestants, the Commission suspended such 10 cent fare in Investigation and Suspension Docket No. 4394.[1]

On July 11, 1938, the Commission issued its original report and order in connection with such proposed 10 cent fare (*Passenger Fares of Hudson & Manhattan Railroad,* 227 I. C. C. 741).[2]

The Commission there found that the proposed 10 cent fare would be unreasonable under *Sections 1 and 15a* of the Act, and had not been justified, but that a fare of 8 cents had been justified. The principal ground of the Commission's finding was that because of diversion which would result from any increased fare due to the competition from other forms of transportation, appellant would earn more under an 8 cent fare than under a 10 cent fare. In this respect the Commission estimated that because of such competition appellant would earn $2,260,817 under the prescribed 8 cent fare, which was approximately $541,000 less than its then current bond interest.[3]

Commissioners Miller and Mahaffie dissented, and Commissioner Eastman did not participate. Commissioner Miller stated:

---

[1]R. 286-287.
[2]R. 286-312.
[3]R. 310-311, 256.

"I dissent from the finding of the majority that the proposed fare of 10 cents has not been justified. The record leaves no doubt in my mind that this fare would be reasonable and lawful for the services performed, and that it has, therefore, been amply justified. The majority report leaves me with the impression that this respondent [appellant], which is badly in need of revenue, is denied the right to assess this fare simply because of a fear that it would result in a material diversion of traffic from its line. The respondent is willing, and is entitled, to assume this risk. We have no right to substitute our judgment in this respect for that of the management of the respondent.

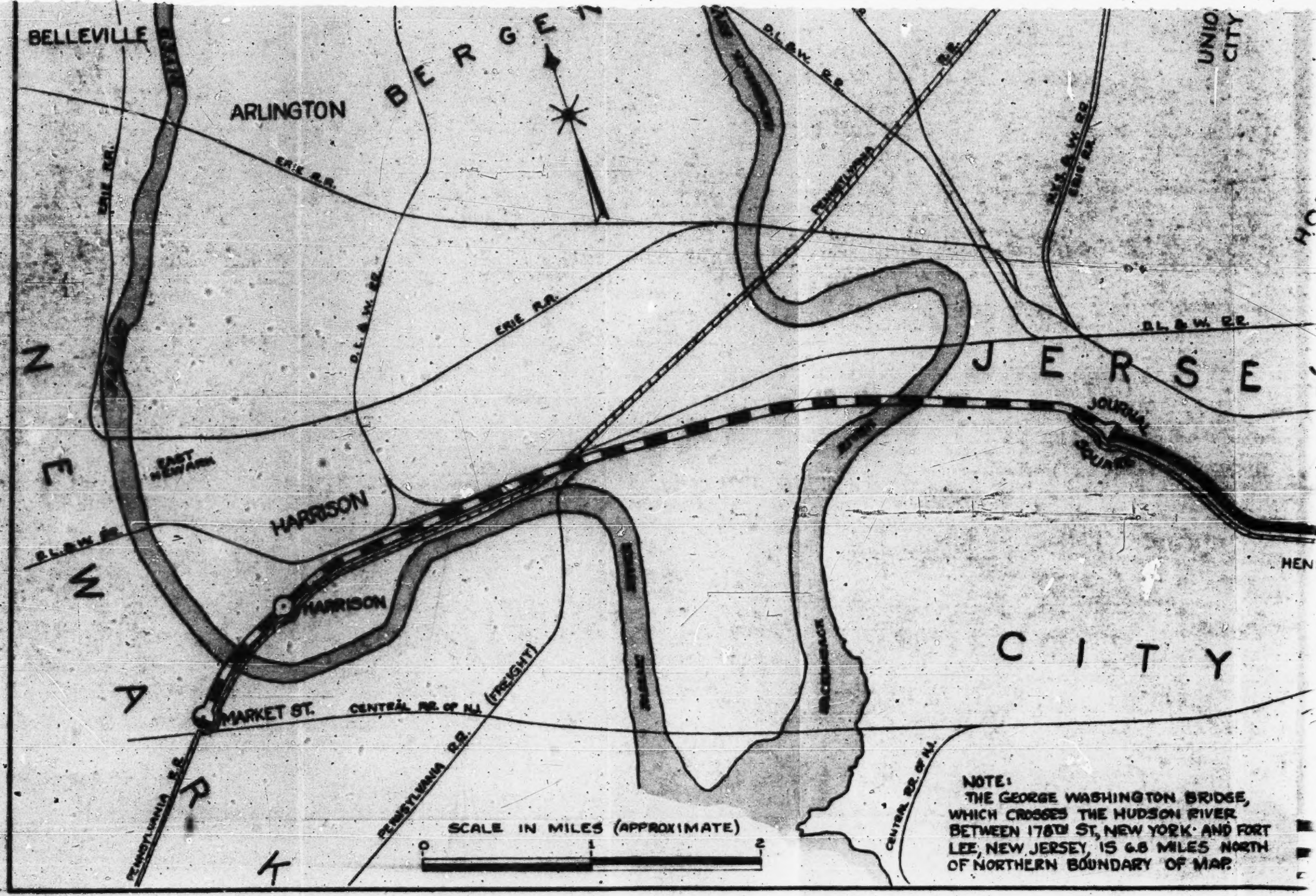
I am authorized to state that Commissioner Mahaffie concurs in this expression."[1]

After the Commission had denied appellant's petition for a rehearing, appellant sought an injunction against the Commission's order limiting appellant to such 8 cent fare before a statutory court of the same District from which this appeal is prosecuted. In an opinion by Judge Fake, the Commission's order was sustained (33 Fed. Supp. 495) on the ground that there was evidence before the Commission to support its findings and order.[2] On appeal to this Court, the order of the District Court was affirmed on April 28, 1941, in a per curiam opinion (313 U. S. 98) on the same ground.

---

[1]R. 311.

[2]Judge Fake dissented from the granting of the instant injunction on this very same ground.


BELLEVILLE
ARLINGTON
BERGEN
ERIE R.R.
D.L.&W. R.R.
ERIE R.R.
D.L.&W. R.R.
ERIE R.R.
D.L.&W. R.R.
ERIE R.R.
D.L.&W. R.R.
UNION CITY
NEWARK
EAST NEWARK
HARRISON
HARRISON
JERSEY CITY
JOURNAL SQUARE
HEN
MARKET ST.
CENTRAL RR. OF N.J. (FREIGHT)
PENNSYLVANIA R.R.
PENNSYLVANIA R.R.
CENTRAL RR. OF N.J.
SCALE IN MILES (APPROXIMATE)
0
1
2
NOTE:
THE GEORGE WASHINGTON BRIDGE, WHICH CROSSES THE HUDSON RIVER BETWEEN 178TH ST, NEW YORK AND FORT LEE, NEW JERSEY, IS 6.8 MILES NORTH OF NORTHERN BOUNDARY OF MAP.


HOBOKEN
ERIE R.R.
N.Y.S.&W. R.R.
ERIE R.R.
JERSEY
CITY
JOURNAL SQUARE
GROVE ST.
HENDERSON STS.
(FREIGHT)
CENTRAL R.R. OF N.J.
CENTRAL R.R. OF N.J.
NEW YORK BAY
MANHATTAN
23RD ST.
19TH ST.
14TH ST.
9TH ST.
CHRISTOPHER ST.
(FULTON ST.
CORTLANDT ST.
GOVERNORS ISLAND
BROOKLYN
E IN MILES (APPROXIMATE)
1
2
NOTE:
THE GEORGE WASHINGTON BRIDGE, WHICH CROSSES THE HUDSON RIVER BETWEEN 178TH ST, NEW YORK AND FORT LEE, NEW JERSEY, IS 6.8 MILES NORTH OF NORTHERN BOUNDARY OF MAP.
LEGEND
H. & M. R.R. SYSTEM
PENNSYLVANIA R.R. PORTION OF JOINT SERVICE.
PENNSYLVANIA R.R. OTHER THAN JOINT SERVICE.

(2) Proceedings before the Commission and the Courts in relation to the Commission's enjoined orders of June 8 and November 2, 1943

(a) Proceedings before the Commission resulting in the order of June 8, 1943.

Upon petition of the appellant filed with the Commission June 27, 1942,[1] for reopening of its order of July 11, 1938, alleging fundamentally changed conditions and asking the Commission to reconsider its denial of a 10 cent fare on appellant's downtown line, the Commission reopened the proceedings for further hearing by its order of July 13, 1942.[2] Commencing September 9 and ending September 19, 1942, full and elaborate hearings were held. At these hearings the Price Administrator appeared as intervenor in his own right but, although accorded full opportunity by the Commission to do so, offered no evidence whatever.[3] Immediately following the enactment of the Inflation Control Act of October 2, 1942, the Price Administrator, as representative of the appellee, Director of Economic Stabilization, intervened in such proceedings pursuant to the provisions of said Inflation Control Act,[4] filed a brief with the Commission dated December 14, 1942, but made no request of the Commission to offer any evidence whatever, prior to his motion preceding the Commission's order of November 2, 1943.

On or about January 25, 1943, the Commission's Examiner issued a proposed report recommending that the appel-

---

[1]R. 390-403.
[2]R. 412.
[3]Tr. 1556-7.
[4]R. 409-410, 411-412.

lant be permitted to increase its fare on its downtown line to 10 cents.[1] Both the appellees filed exceptions to this report.[2] In the Price Administrator's exceptions he expressly conceded as to the recommended 10 cent fare,

> "We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine."[3]

On April 20, 1943, argument on such proposed report was held before the entire Commission.[4] On such argument, an exhibit was filed at the request of appellees but upon stipulation of the parties, showing appellant's traffic and revenue for the first two months of 1943—the latest figures then available.[5] (On the basis of this exhibit and on a computation of appellant's operating expense based on a formula agreed to by all parties the Commission in its report of June 8, 1943, made an estimate of appellant's probable net revenues available for bond interest for the year 1943).

Thereafter, the Commission made its report, findings and order of June 8, 1943 (one of the two orders here enjoined).[6] The Commission overruled the Examiner's recommendation that appellant be permitted to increase the fare on its downtown line to 10 cents and limited the increase to 9 cents, *although appellant had presented certain evi-*

---

[1]H. & M. Ex. D-8.
[2]H. & M. Ex. D-9 (Exceptions of Jersey City); R. 365-380 (Exceptions of Price Administrator).
[3]R. 378.
[4]Tr. 1929-2031.
[5]R. 410-411, 257, 275.
[6]R. 248-272.

dence that, by reason of the physical limitations of its fare collection boxes, which limitations could not be obviated, *it would be impracticable to collect a 9 cent cash fare.*[1] The Commission's order expressly limited the increased fare of 9 cents to the period of the war and 6 months thereafter.

Commissioners Miller and Mahaffie again dissented, being joined by Commissioner Patterson, on the ground that the record fully justified appellant's proposed 10 cent fare. Commissioner Miller stated:

> "I concur in the finding of the majority insofar as it gives approval to increasing the present fare to 9 cents. In my dissent to the prior report, 227 I. C. C. 741, I expressed the view that the record there amply justified a finding that the proposed fare of 10 cents would be reasonable and lawful for the services performed by this respondent. Nothing is presented as a result of the further hearing to cause me to change that opinion.
>
> Moreover, I see no sufficient reason for here limiting the time during which the 9 cent fare shall remain in effect.
>
> I am authorized to state that Commissioners Mahaffie and Patterson join in this expression."[2]

Commissioner Aitchison did not participate in the disposition of this proceeding.

(b) Proceedings before the Commission resulting in the order of August 3, 1943, modifying the order of June 8, 1943.

On July 8, 1943, appellant filed a sworn petition for reconsideration and modification of the Commission's

---

[1]Tr. 1125-7.
[2]R. 271-272.

findings and order of June 8, 1943.[1] The modification requested was expressly limited to such as might be "necessary merely to permit practicable compliance by petitioner (appellant) with those findings."[2] Otherwise the petition asked no modification of the findings and order of June 8, 1943, authorizing a 9 cent fare.

The petition, after calling the Commission's attention to the fact that the Commission had overlooked evidence already of record as to the physical limitations of appellant's fare boxes which made it impracticable for appellant to collect a 9 cent *cash* fare, set out in greater detail the facts in this respect. Such petition also set out facts showing that the only means of practicable compliance with the Commission's findings and order of June 8, 1943, would be to charge, in place of the uncollectible 9 cent *cash* fare, alternative fares of 11 tokens for $1 or a cash fare of a dime, applicable both to appellant's downtown and uptown lines. The petition showed that although appellant's present fare on its uptown line is 10 cents it would be impracticable to limit such alternative fares to its downtown line, even though the application of such token fares to its uptown line would reduce appellant's revenues from that line. The petition asked that authority be granted to charge such alternative fares as soon as tokens could be obtained and appellant's fare collection boxes modified, and that appellant be authorized in the meantime to charge a straight 10 cent cash fare on its downtown as well as on its uptown line. It also asked the Commission to remove the provision of its prior order limiting such increased fares to the period of the war and

[1] R. 327-336.
[2] R. 327.

six months thereafter. The petition asked that any party to such proceedings who might be opposed to the granting of the petition be required to file a verified reply thereto within ten days; that the Commission upon the basis of such petition and any such replies determine without further hearing the issues thereby presented; and that if such alternative fares were authorized appellant be permitted to publish them on five days' notice. As ground for such procedure, there was attached to the petition an affidavit[1] showing that, since the effective date of the Commission's order of June 8, 1943, appellant had suffered a loss in excess of $1,000 per day because of its inability to collect the authorized 9 cent cash fare, and would continue to lose such amount until the proposed alternative fares should become effective.

Jersey City, without itself filing any petition for reopening or reconsideration of the Commission's order of June 8, 1943, as permitted by the Commission's General Rules of Practice,[2] on July 14, 1943, filed an unverified reply[3] to appellant's petition. That reply alleged *inter alia:*

> "It is the position of protestants that the petition should be denied, that the effectiveness of the decision dated June 8, 1943, should be indefinitely suspended and, in view of the questions and assertions now brought forth by the respondent, that the proceeding should be set for further hearing. Otherwise, the petition, in its entirety, should be denied."[4]

---

[1]R. 336-345.
[2]See Appendix 1 hereto.
[3]R. 345-351.
[4]R. 350.

Nowhere in such reply was any ground stated as to why "the effectiveness of the decision dated June 8, 1943, should be indefinitely suspended," and the reply mainly consisted of arguments why the Commission should not authorize appellant to charge a straight 10 cent fare pending its ability to obtain tokens and modify its fare collection boxes. Moreover, it will be noted that Jersey City's suggestion that the proceedings should be set for further hearing was made solely "in view of the questions and assertions now brought forth by the respondent (appellant)." These "questions and assertions", it has already been noted, were expressly limited to a request for such modification of the Commission's findings of June 8, 1943, prescribing a 9 cent fare

> "as is necessary merely to permit practicable compliance by petitioner with those findings".[1]

The only ground for such modification was that it was impracticable for appellant to collect a 9 cent *cash* fare. The further hearing suggested in Jersey City's reply must be taken, therefore, as confined to appellant's questions and assertions relating to the necessity for such substitution of alternative fares for a 9 cent *cash* fare. *Nowhere in its reply did Jersey City suggest or ask a further hearing as to the justification for the 9 cent fare itself instead of the existing 8 cent fare.*

The Price Administrator filed a substantially similar reply.[2] In such reply such appellee stated:

> "And in view of Petitioner's tremendously improved current earnings, it is requested that the

[1] R. 327.
[2] R. 352-365.

> Commission reconsider its previous modification of its original order, and return Petitioner's downtown fares to the original level of 8 cents. This will serve the national program to keep down the cost of living."[1]

While the Price Administrator in his reply did rehash the arguments he had advanced before the Commission prior to the Commission's report and order of June 8, 1943, to the effect that because of appellant's increased traffic the Commission should authorize no increase whatever in appellant's present 8 cent fare, that reply specified no new evidence which, if further hearing were granted, the Price Administrator would present in this respect, nor did it suggest that the Price Administrator would offer any evidence to show that the increased fares would result in inflation or increased cost of living, as to which questions, it has been noted, he had previously failed to offer any evidence whatever.

It should be noted that, under the Commission's General Rules of Practice, these statements in the respective replies of the appellees did not constitute petitions for reconsideration or reopening of the Commission's order of June 8, 1943 in either form or substance and, in any event, were filed after the time had expired under those Rules for such a petition.[2]

---

[1]R. 364.

[2]Under Rule 101(e) of the Commission's Rules of Practice, it is provided that any petition for rehearing, further hearing, reconsideration or any other change in a decision or order of the Commission, must be filed within thirty days after the date of the service of such decision or order "granting an application in whole or in part" and within sixty days after the date of service of any other character of decision or order. (See Appendix 1 hereto.)

(cont. on next page)

The Commission on August 3, 1943, issued a report, findings and order[1] based upon appellant's petition and such unverified replies, and without further hearing. *After frankly acknowledging that it had failed to give proper weight to the evidence introduced by appellant prior to the Commission's order of June 8, 1943, showing that it would be impracticable for appellant to collect a 9 cent cash fare,*[2] and also noting that on this account appellant was losing in excess of $1,000 a day of the revenue the Commission had intended to accord appellant by such order,[3] and on a specific finding that it would be impracticable for appellant to collect a 9 cent cash fare,[4] the Commission stated:

> "Under the proposed basis the occasional passenger will pay 10 cents on both of respondent's lines. In the prior report we found that the fares and charges of record for commutation service of carriers other than respondent serving the New York metropolitan area afford stronger support, differences in transportation services considered, for an 8-cent or a 9-cent fare than for a 10-cent fare on respondent's downtown line. That finding; however, was based upon a comparison between fares and services for commutation passengers and not for passengers who may ride only occasionally in commutation equipment. On the railroads generally the latter passengers do not ride on commutation tickets but on standard coach tickets, the price of which is

---

The Commission's order of June 8, 1943, authorizing the enjoined 9 cent fare had been made on the application of appellant for leave to publish and charge a 10 cent fare and, therefore, constituted a grant in part of such application.

[1] R. 313-326.
[2] R. 322.
[3] R. 319.
[4] R. 322.

subject to the minimum charge of 10 cents for all classes of rail passenger equipment approved by us in *Passenger Fares and Surcharges*, 214 I. C. C. 174, 257. *Upon the facts of record as adduced at the several hearings herein, we now find a fare of 10 cents to be reasonable for the occasional local interstate passenger on respondent's downtown line. As stated, for the purposes of this report, we must regard the maximum reasonable local interstate fare on the uptown line to be 11 cents.*"[1]

* * * * *

"Upon reconsideration, we affirm our prior conclusion that the proposed fare of 10 cents has not been justified for general application on respondent's downtown line. We further conclude that an increased local fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, has been justified for application during the remaining period of the war and 6 months after its termination; provided, that contemporaneously with the establishment and maintenance of such fares on the downtown line the same alternative basis, namely, 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, be established and maintained on local interstate traffic on respondent's uptown line." (Italics supplied.)[2]

The Commission, however, denied so much of the appellant's petition as asked for the removal of the limitation on such increased fares to the period of the duration of the war and six months thereafter, and also denied appellant the right to charge a 10 cent cash fare on its downtown

---

[1]R. 323.

[2]R. 325-326.

line pending its ability to obtain tokens and to modify its fare collection boxes. Neither did the Commission grant the requested permission to publish the alternative fares on five days' notice. Commissioners Miller, Mahaffie and Patterson again dissented on the ground that on the record before the Commission it should authorize a straight 10 cent fare on the appellant's downtown line.[1] Commissioner Aitchison did not participate.

(c) Proceedings before the District Court in relation to the order of August 3, 1943.

On September 13, 1943, before appellant had undertaken to publish the alternative fares authorized by the order of August 3, 1943, Jersey City, filed its *original* complaint[2] in these proceedings specifically asking that such order be enjoined but only

> "*in so far* as such order permits the establishment of any local interstate fare *in excess of nine cents* for

---

[1]R. 326.

[2]R. 1-19. This *original* complaint was clearly premature. Appellant filed no answer to it, however, because before appellant's time for answer had expired, Jersey City had filed its *amended* complaint. The *original* complaint was premature because the Commission's order of August 3, 1943, authorizing the alternative fares was not self-executing but purely permissive. Before the alternative fares could become effective, it was necessary under that order that the appellant publish and file such fares on the full 30-day statutory notice. Upon such publication, either or both of the appellees could have applied to the Commission under Section 15(7) of the Interstate Commerce Act, for suspension of such alternative fares on the very grounds alleged in Jersey City's original complaint. Therefore, until such fares had been published and suspension asked and denied, resort to the injunctive powers of the courts was premature.

transportation on the downtown line, * * *" (Italics supplied.)[1]

Said original complaint alleged as the fundamental ground of the invalidity of the Commission's order of August 3, 1943, that:

> "17. It is apparent that the Commission, in authorizing local downtown fares *in excess of the nine cent fare* stated to be the reasonable maximum charge in the report and order of June 8, 1943, 255 I. C. C. 649, does so wholly because of an alleged carrier disability. *As to such alleged carrier disability the plaintiff* [*Jersey City*] *herein has been deprived of its full day in Court* by not having been given an opportunity to cross-examine witnesses, refute and otherwise present counter evidence, and the order was entered without due process of law. To the extent that the Commission considered *such matters* in this regard, it acted arbitrarily and beyond the realms of proper judicial procedure." (Italics and matter in brackets supplied.)[2]

Such original complaint raised no question whatever as to the validity of the 9 cent fare authorized by the Commission's order of June 8, 1943, *or as to the increase there involved over the existing 8 cent fare* authorized by the Commission's order of July 11, 1938. On the contrary, such original complaint implicitly and explicitly asked that the Commission and the appellant be required to observe the Commission's order of June 8 prescribing a 9 cent fare.

While the Price Administrator did not formally intervene in such original complaint, his counsel on the subse-

---

[1]R. 10.
[2]R. 7.

quent hearing of September 28, 1943 before the Commission, hereinafter referred to, stated that he did not so intervene because of the Commission's order of September 18, 1943, reopening the proceedings,[1] to which reference will now be made.

(d) Further proceedings before the Commission resulting in the order of November 2, 1943, affirming modification of the order of June 8, 1943, by order of August 3, 1943.

On September 18, 1943, the Commission of its own motion reopened the proceedings for further hearing.[2] The grounds on which it acted and the limitations which it placed on the scope of the reopening are stated in the Commission's report of November 2, 1943, as follows:

> "On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court for the District of New Jersey, seeking to enjoin our action of August 3, 1943, on the ground, among others, that it had been 'deprived of its full day in court by not having been given the opportunity to cross-examine the witnesses, refute and otherwise present counter evidence * * *.' *Accordingly, out of an abundance of caution*, by order of September 18, 1943, we reopened this proceeding for further hearing 'to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943,' and to afford 'any party hereto

[1]Tr. 2201-4.
[2]R. 351-352.

* * * the right to cross-examine adverse witnesses.' (Italics supplied.)[1]

On the further hearing held under the Commission's order of September 18, 1943, appellant offered evidence to show that it was impracticable, because of the physical limitations of its fare collection boxes, which could not be obviated, to collect a cash fare of 9 cents and that the only practicable means of substantial compliance with the Commission's order of June 8, 1943, would be to apply both to the downtown and uptown lines alternative fares of 11 tokens for $1 or a cash fare of one dime, although this would result in reducing appellant's revenue from its uptown line.

Appellant, in order to show that it was losing in excess of $1,000 a day through its inability to collect the authorized 9 cent fare, itself introduced exhibits showing its actual local interstate passenger traffic and revenues for the eight months ended August 31, 1943, and its local interstate passenger traffic and revenues for the eight months ended August 31, 1943, equated to a twelve months' basis.[2]

Jersey City, although it had induced the Commission to reopen its order of August 3, 1943, authorizing the alternative fares, by the allegations of its *original* complaint that it had been denied an opportunity to cross-examine appellant's witnesses and to offer counter-evidence with reference to appellant's disability to collect a 9 cent fare, offered no evidence whatever in this respect on the further hearing of September 28 and 29 under such order of reopening. The only evidence offered by the Price Administrator in this

[1]R. 274.
[2]Tr. Exs. F-148, F-149, F-150.

respect was confined to an effort to prove that appellant's estimate of the potential ratio of use of token fares to cash fares under such alternative fares was erroneous.[1]

Both appellees, however, attempted to offer certain evidence and to develop by cross-examination certain data with reference to the revenues and operating expenses of the appellant for the first seven months of 1943, for the express and sole purpose of showing that appellant was entitled to no increase whatever over its present 8 cent fare on its downtown line, because due to increase in its traffic, appellant, without any increase in its fare, (1) would earn its full current bond interest, (2) would earn "more than" the revenue which the Commission had, in its report of July 11, 1938, estimated appellant would earn under the 8 cent fare authorized by its order of that date, and (3) would earn "more than" the revenue which the Commission had, in its report of June 8, 1943, estimated appellant would earn under the 9 cent fare authorized by its order of that date.[2] Appellees claimed that it was the Commission's intention to limit appellant to such estimated revenues.[3] *Appellees did not tender any evidence or make any offer to prove that appellant would earn a fair return on its railroad properties under its present 8 cent fare or that, under the enjoined fares, appellant would earn more than such a fair return.*

Included in such offered evidence was a condensed corporate income statement of the Hudson & Manhattan Rail-

---

[1]Tr. 2424-41, Tr. Ex. F. 142.
[2]Tr. 2215-29, 2446-50, 2144-51.
[3]Tr. 2149-50, 2449-50.

road Company for the seven months ending July 31, 1943.[1] A similar statement for the five months ending May 31, 1943 had been attached to the reply of the Price Administrator of July 19, 1943 to the appellant's petition of July 8, 1943 for reconsideration and modification of the Commission's findings and order of June 8, 1943.[2] In the Commission's report of August 3, 1943, it had rejected that statement as being without probative value because it did not show the income of appellant from its railroad operations but was a consolidated statement of the income of the appellant company from all operations, including its Hudson Terminal Buildings and other real estate.[3]

The Examiner rejected such evidence and refused to permit such cross examination as not being within the limitations of the Commission's order of reopening of September 18, 1943, but specifically advised counsel for appellees that if they desired to broaden the issues, they could petition the Commission for a modification of that order for the purpose of receiving the rejected evidence and cross examination.[4] It is particularly to be noted that in so doing the Examiner went beyond the letter of Rule 101 of the Commission's Rules of Practice,[5] since the tendered evidence and cross-examination could have no relevance whatever unless the Commission's order of June 8, 1943 authorizing the 9 cent fare were reopened, and since the time to petition for the reopening of that order had under such Rule long since expired.

---

[1]Tr. 2446-50, R. 66.
[2]R. 364.
[3]R. 324-325.
[4]Tr. 2034-36, 2144-51, 2215-29, 2446-50.
[5]See Appendix 1 hereto.

On October 14, 1943, the Price Administrator filed a petition (entitling it a "motion")[1] for modification of the Commission's order of September 18, 1943,

> "to eliminate the restrictions heretofore imposed upon said reopened hearing, to reopen said proceeding for the purpose of receiving testimony and exhibits with respect to the revenues, income and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the Act of October 2, 1942."[2]

The only specifications in such petition of the purpose of adducing such evidence read as follows:

> "8. Counsel for the protestants stated if given an opportunity to demonstrate by presentation of evidence at the hearing he would show that the earnings of the company, as a result of the war, at an 8-cent fare and for the full year of 1943, would exceed the amount which the Commission found to be adequate and reasonable in its 1938 order or its order of June 8, 1943, authorizing an increase."[3]

In this motion, as on the further hearing of September 28 and 29, 1943, the Price Administrator made no offer to prove either that under appellant's present 8 cent fare appellant would earn a fair return on the value of its rail-

---

[1]R. 67-70.
[2]R. 70.
[3]R. 69.

road properties, or that under the enjoined fares appellant would earn more than such a fair return.

On October 25, 1943, appellant filed a reply to this petition,[1] pointing out that Jersey City had neither filed an independent petition nor joined in that of the Price Administrator, and alleging that Jersey City's failure so to do was occasioned by Jersey City's recognition that it would stultify Jersey City's *original* complaint then pending before the District Court, which in substance asked that the Commission and appellant be required to abide by the Commission's order of June 8, 1943 authorizing a 9 cent fare on the downtown line. Such reply also pointed out that the Commission, neither by its order of July 11, 1938 nor by its order of June 8, 1943, had undertaken to limit the revenue which appellant might earn under the 8 cent and 9 cent fares therein respectively authorized, but had merely estimated what revenue appellant might earn under such fares in view of existing competition of other forms of transportation; further, that appellant plainly was not limited by law to earning merely its current interest on its bonds.

By a letter to the Commission[2] dated October 25, 1943, counsel for Jersey City purported to

> "adopt and otherwise ratify the contents of the aforesaid (Price Administrator's) petition as though it were our own."

This letter did not comply with the Commission's General Rules of Practice either as to form, content, or time of serv-

---

[1]R. 380-389.

[2]R. 389-390.

ice of petitions for reconsideration, reopening, further hearing or other modification of an order, and consequently was not treated as constituting such a petition by the Commission in its report of November 2, 1943.

On November 2, 1943, the Commission issued its report and order[1] which the District Court has enjoined.

The Commission's report, after reciting, as already quoted, that it had issued its order of reopening of September 18, 1943 "out of an abundance of caution" stated, with reference to the further hearing held on September 28 and 29 under that order:

> "At this further hearing both the New Jersey protestants and the Price Administrator noted their exceptions to the restriction of the scope of the further hearing as made in our order of September 18, 1943, and the Price Administrator's brief was accompanied by a motion, filed in behalf of the Director of Economic Stabilization, for modification of our order of September 18, 1943, so as to reopen this proceeding 'for the purpose of receiving testimony and exhibits with respect to the revenues, income, and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges, and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the act of October 2, 1942,' called the Stabilization Act. To this motion respondent replied. Movant states that he wishes opportunity to exhibit the income and expenses of respondent for the first 7 months of 1943 and for the same period of 1942 for the purpose of showing that respondent's earn-

[1] R. 272-285.

ings under the present fares are adequate and that no increase in the present 8-cent downtown fare should be permitted."[1]

The Commission then stated:

"In the complaint of the City of Jersey City before the District Court [*i.e.* the *original* complaint herein of September 13, 1943, then still pending before the District Court] no question has been raised as to our action authorizing an increase in the downtown fare from 8 to 9 cents, but only as to an increase from 9 to 9½ cents." (Matter in brackets supplied.)[2]

The Commission further stated:

"At the time of the oral argument before us on April 20, 1943, on the facts of record upon which we issued our second report of June 8, 1943, the traffic and revenue results on the lines of respondent for the year 1942 and the traffic results for January and February, 1943, the latest periods for which any such results were then available, were by agreement of the parties made a part of the record. The data then adduced, along with the other determinative facts of record, are set out in, and were considered by us at the time of our second report. *Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear, the alternative-fare basis herein approved can not be expected*

[1] R. 274-275.
[2] R. 275.

to yield materially better revenue results to respondent than we anticipated at the time of the second report [*i.e.*, the report of June 8, 1943]. Accordingly, we see no sufficient reason for further reopening this proceeding at this time, and the motion will therefore be overruled." (Italics and matter in brackets supplied.)[1]

Further in this connection, the Commission stated:

"Based upon the number of local interstate passengers carried by respondent in the first 8 months of 1943, adjusted to a 12-month basis[2] and assuming a 5 percent loss in the downtown local passengers by reason of an increase in the fare, the proposed alternative basis can be expected to bring to respondent at least no greater gross or net revenue than would result under cash fares of 10 cents uptown and 9 cents downtown, if both of such fares were collectible, as contemplated by our findings in the second report. If such estimate were based upon a use ratio of 90 percent tokens and 10 percent dimes, as respondent claims it should be, the result would approximate $85,000 less annual revenue under the alternative basis than under the 10-cent and 9-cent cash fares."[3]

Having reached these conclusions, the Commission then made the following findings of fact, which it underscored in its report, stating under each finding the evidence of record upon which such finding was based. For the sake of brevity such statements of the evidence underlying such

[1] R. 275.

[2] As shown by appellant's exhibits Tr. Exs. F-148, F-149 and F-150, referred to above, introduced at the hearings of September 28 and 29, 1943.

[3] R. 279.

findings are here omitted. The findings themselves are as follows:

> "Upon the amplified record before us, we find that the following basic facts, as underscored, have been established:
>
> 1. It is impracticable for respondent to collect a cash fare of 9 cents.[1]
>
> 2. There is available to respondent no practicable method of collecting a fare of, or approximating, 9 cents except by the use of tokens.[2]
>
> 3. The use of tokens only for the local downtown traffic, while contemporaneously using cash fares for the other local traffic of respondent, is impracticable.[3]
>
> 4. The use of an alternative-fare basis of 11 tokens for $1 or a cash fare of a dime for local interstate passengers on both the downtown and uptown lines is the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings and conclusions in the second report [*i.e.* June 8, 1943] as necessary to insure adequate transportation service.[4]
>
> 5. The modification of our prior findings as made in the third report of August 3, 1943, is not

---

[1] R. 276.
[2] R. 277.
[3] R. 278.
[4] R. 278.

in conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act.[1]

6. A cash fare of 10 cents for the occasional or irregular passenger on the downtown line compares favorably with the reasonable charge made for similar service on railroads generally.[2]

The Commission then stated:

"Upon consideration of the entire record, and more particularly of the foregoing findings of fact, we affirm our conclusions in the report on reconsideration of August 3, 1943, namely, that a local interstate fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, has been justified as reasonable and otherwise lawful, for application during the remaining period of the war and 6 months after its termination; provided that contemporaneously with the establishment and maintenance of such fares on the downtown line, the same alternative basis be established and maintained for local interstate traffic on respondent's uptown line.

Respondent asks for permission to establish the fares herein approved upon 10 days' notice to us and to the public, instead of 30 days as required in section 6(3) of the act. A downtown fare of 9 cents was approved by us on June 8, 1943, and in the ordinary course, if collectible, that fare would now have been in effect for about 4 months. Accordingly, we feel warranted in exercising the powers given to us in section 6(3) and permitting the establishment of the approved fares upon less than the statutory notice.

[1] R. 282.
[2] R. 283.

> An order overruling the aforesaid motion of the Director of Economic Stabilization, and granting permission to respondent to establish the fares herein approved upon not less than 15 days' notice, will issue." (Italics supplied.)[1]

Commissioners Miller, Mahaffie and Patterson reiterated their view, previously expressed in connection with the Commission's reports and orders of June 8, 1943, and August 3, 1943, that the Commission should have authorized appellant to charge a straight 10 cent fare on its downtown line.[2] Commissioner Aitchison again did not participate.

On November 6, 1943, appellant filed with the Commission its local passenger tariff No. 53, effective November 22, 1943, publishing alternative interstate fares of 11 tokens for $1 or a cash fare of a dime, applicable both to appellant's downtown and uptown line.[3]

---

[1]R. 283-284.

[2]R. 284.

[3]On the request of the District Court and with the permission of the Commission, appellant voluntarily postponed the effective date of its tariff to November 29, 1943. On the issuance by the District Court of its interlocutory injunction herein on November 26, 1943, appellant with the Commission's permission and pursuant to the terms of such injunction further postponed the effective date of its tariff to January 16, 1944. On the issuance of the permanent injunction herein on January 14, 1944, appellant, pursuant to the terms of such injunction, cancelled its tariff publishing alternative fares, thereby leaving in effect its present 8 cent fare on its downtown and its present 10 cent fare on its uptown line.

(e) Proceedings before the District Court in relation to the orders of June 8, 1943, and November 2, 1943.

On November 18, 1943, Jersey City filed its *amended* complaint herein[1] asking that the Commission's orders of June 8, 1943, and November 2, 1943, be perpetually set aside, annulled and enjoined in so far as such orders permitted any fare on appellant's downtown line in excess of 8 cents (the fare authorized by the Commission's order of June 11, 1938).

The only allegations of the amended complaint to which it is here necessary to refer are those to which the majority below alone referred, and on which primarily the majority below have sought to justify the injunction granted on the basis of such amended complaint. Those allegations were that the Commission had denied Jersey City a full and fair hearing by repeatedly refusing to receive evidence and permit cross-examination by Jersey City to show that by reason of appellant's increased revenues in 1943 due to increased traffic, no increase over appellant's present 8 cent fare prescribed by the Commission's order of July 11, 1938 was justified. The remaining allegations of the amended complaint are so frivolous that they were ignored by the majority below and will be ignored here.

The Price Administrator filed a petition of intervention under Jersey City's amended complaint,[2] making similar allegations and asking similar relief, but in addition alleging that the Commission's orders in permitting an increase over the 8 cent fare in effect on appellant's

[1] R. 25-54.
[2] R. 55-65.

downtown line on September 15, 1942 (*i.e.* the fare authorized by the Commission's order of June 11, 1938) were in violation of the Stabilization Act (the Inflation Control Act) of October 2, 1942.

The United States of America was named as a defendant in both the amended complaint and the petition of intervention, but filed a neutral answer[1] on the ground that a question of the relative powers of two agencies of the government was involved.

The appellants filed their respective answers to the amended complaint and to the petition of intervention.[2] Said answers, in substance, admitted the making of the orders of June 8, 1943 and November 2, 1943; denied that appellees were not accorded a full and fair hearing; denied that said orders contravened either the Emergency Price Control Act or the Stabilization (Inflation Control) Act; and alleged that said orders were made after a full hearing and consideration of the evidence and argument of all parties and were fully supported by evidence before the Commission and by the Commission's findings based on such evidence.

In addition, the appellant carrier in its answers, and the Interstate Commerce Commission in its amended answer, alleged that neither of the appellees had exhausted its administrative remedies before the Commission; moreover, that appellees were estopped from seeking an injunction

---

[1]R. 92-93.

[2]Answer of Interstate Commerce Commission to amended complaint, R. 88-92; answer of Interstate Commerce Commission to petition of Price Administrator, R. 98-100; amended answer of Interstate Commerce Commission to amended complaint and to petition of Price Administrator, R. 101; answer of appellant to amended complaint, R. 71-88; answer of appellant to petition of Price Administrator, R. 93-98.

against the Commission's orders of June 8, 1943, and November 2, 1943 for the reasons set forth under Point III of the Argument herein.

(f) Rulings below.

Both appellees applied for an interlocutory injunction, which was granted November 26, 1943.[1]

Final hearing was had on December 14, 1943. On January 12, 1944, the majority of the court below, Judges McLaughlin and Meaney, granted the final order and decree,[2] Judge Fake dissenting.

The opinion of the majority[3] disposed of the matters involved under two headings (1) "Full and Fair Hearing", and (2) "Economic Stabilization." It stated that in view of the conclusions which it reached under these headings "there is no necessity for discussing the other points raised by the plaintiff and intervenor."

Under the heading "Full and Fair Hearing", the majority held:

First, that the enjoined orders of the Commission were based on Section 15 (1) of the Interstate Commerce Act,[4] although neither of the enjoined orders so stated, and although the original order of July 11, 1938, to which they were amendatory, was expressly based on both Section 1 and Section 15a of the Act.[5]

---

[1]R. 116-118.
[2]R. 218-220.
[3]R. 194-201.
[4]The majority presumably meant to refer to Section 15a—the so-called "revenue section" of the Act.
[5]R. 311.

Second, that both the appellees had been denied a full and fair hearing by reason of the Commission's refusal to reopen the proceedings to receive evidence relating to the 1943 earnings of appellant "for the purpose of showing that, under such earnings, no increase in fare whatsoever was justified."

Third, that both appellees had exhausted their administrative remedies. Here the Court ignored the fact that neither Jersey City nor the Price Administrator had ever within the Commission's Rules of Practice filed any petition for reopening, rehearing or reconsideration of the Commission's orders of June 8, 1943, and August 3, 1943, and that only the Price Administrator had petitioned for modification of the Commission's order of September 18, 1943.

Fourth, the Court made no reference to the issue of estoppel, except to say:

> "We do not see that the contentions raised by the defendants that the plaintiffs are estopped from questioning the validity of the orders of June 8, 1943, and November 2, 1943; and that the action is prematurely brought, are answers to the above." [*i.e.*, denial of full hearing.][1]

Apparently the majority confused the question of estoppel with the question of failure to exhaust administrative remedies. See the Court's finding of fact No. 30.[2]

Under the heading "Economic Stabilization" the majority held that the Commission had not given sufficient consideration to the importance of this issue. It quoted only the Commission's conclusion with respect thereto in

---

[1]R. 198.
[2]R. 216.

its report of June 8, 1943; omitted any reference to the fact shown by the Commission's report that the Price Administrator had presented no evidence whatever; omitted all reference to the Price Administrator's express admission that the proposed increase in fare would not of itself result in inflation; and omitted any reference to the Commission's lengthy discussion in that report of the Price Administrator's contentions in this respect in his exceptions and briefs. The majority based its ruling that the Commission had not sufficiently considered this question solely on the case of *Philadelphia Coke Company* v. *Bowles*, United States Emergency Court of Appeals, December 15, 1943. The majority ignored, without mention, the decision of the Court of Appeals for the District of Columbia in *Washington Gas Light Company* v. *Byrnes*, 137 F. (2d) 547, which both appellants had cited to the District Court, and which this Court has since affirmed.[1]

Finally, neither in its opinion, findings of fact, nor conclusions of law, did the majority find that the Commission's orders of June 8, 1943, and November 2, 1943, were without evidence to support them, or that had the evidence which the Commission rejected been received, the Commission must, as a matter of law, have ignored all the other evidence before it, which other evidence even the appellees do not contend would otherwise have been insufficient to support the enjoined orders.

Judge Fake dissented[2] on five grounds:

First, that there was ample evidence to sustain the Commission's orders;

---

[1] *Sub nomine Vinson* v. *Washington Gas Light Company*, U. S. , decided March 27, 1944.

[2] R. 201-205.

Second, that whether the excluded evidence would have changed the Commission's conclusions was a question for the Commission and not the Court to determine since there otherwise was evidence to sustain those conclusions;

Third, that the majority opinion invaded the province of the Commission in undertaking to determine when the Commission might in its discretion close a record;

Fourth, that the Commission had properly exercised such discretion in this case; and

Fifth, that the majority opinion also undertook to invade the province of the Commission in considering the subject of inflation, the determination of which, Judge Fake pointed out, the very Executive Orders quoted by the majority recognized as remaining with the Commission.

The questions presented by this appeal are substantial. Aside from the serious effect of the injunction upon the revenues of the appellant Hudson & Manhattan Railroad Company, the decision of the lower Court, if allowed to stand, would establish principles which would have far-reaching effects in permitting the Director of Economic Stabilization and the Price Administrator to impinge upon the jurisdiction of the Commission. In this respect, the appeal involves the first case respecting the effect of the Emergency Price Control Act and of the Inflation Control Act on the administration by the Interstate Commerce Commission of its powers and duties under the Interstate Commerce Act to prescribe just and reasonable rates. Moreover, it involves the important question whether the Interstate Commerce Commission may be deprived of the power effectively to correct its own acknowledged error through

denial of its right to determine as an administrative matter when a record involving continually changing economic conditions may properly be closed.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

Appellant will rely on all errors assigned in its Assignment of Errors dated February 9, 1944,[1] but it is here intended to urge particularly assigned errors numbers I, IV, VI, IX, X, XII, XIII, XV, XVIII, XIX, XX, XXI, XXII, XXIII, XXV, XXVIII and XXXVII-B. These assigned errors, however, will not be here set out in order to avoid unnecessary protraction of this brief and because they are in substance indicated in the Summary of Argument herein contained.

---

[1] R. 221-234.

SUMMARY OF ARGUMENT

I

The injunction appealed from, though granted on a wholly specious finding by the majority below that the Commission had denied appellees a full and fair hearing, constitutes in reality an unjustifiable interference by the District Court with the Commission's proper exercise of its administrative discretion to determine the necessity for, and the manner of, correcting the Commission's acknowledged error in limiting the increase authorized by its order of June 8, 1943 in appellant's existing 8 cent fare on its downtown line to an uncollectible 9 cent *cash* fare.

II

Such injunction constitutes a further unjustifiable interference by the District Court with the Commission's proper exercise of its administrative discretion, pursuant to which the Commission undertook to limit a further hearing, granted on its own motion for the purpose of correcting such error, solely to evidence as to the necessity for and the manner of correcting such error, without reopening the whole question of appellant's right to any increase whatever in its present 8 cent fare and receiving evidence tendered by appellees in this respect.

III

The Commission's refusal to reopen the proceedings before it to receive the evidence tendered by the appellees,

based upon the Commission's express finding that if such reopening were granted

> "we have no reason to believe * * * we would feel warranted in modifying our finding as made in the second report"

was not, as the District Court found, arbitrary and unlawful. On the contrary, it was the Commission's duty before reopening the proceedings to determine whether the tendered evidence, if received, would have warranted or required the Commission to disregard all other evidence before it which would have supported its findings and orders, since otherwise it would have been futile to reopen the proceedings to receive the tendered evidence.

IV

The refusal of the Commission further to reopen the proceedings to receive the evidence tendered by appellees, where on such tender the Commission considered that evidence and determined it would not require any change in its prior findings, did not warrant the District Court in enjoining the Commission's orders in the absence of findings by the court either (a) that there was no evidence before the Commission to support its enjoined orders, or (b) that had the tendered evidence been received the Commission must, as a matter of law, have disregarded all other evidence which otherwise would have supported such orders, and must have denied the increased fares thereby authorized.

V

The determination by the Commission as to when a record before it involving continually changing economic

conditions may properly be closed, is necessarily a matter wholly within its sound discretion. Otherwise, the Commission might be prevented from effectively according relief as to administrative matters within its exclusive jurisdiction which require prompt disposition in order to make such relief effective. The District Court here, therefore, was without authority to substitute its judgment in this respect for that of the Commission in the absence of a finding and of the evidence to support such finding, that the Commission had abused its discretion.

VI

The Commission's refusal further to reopen the proceedings to permit appellees to introduce evidence purporting to show that the Commission, because of appellant's increased 1943 traffic, was not justified in permitting appellant any increase over its present 8 cent fare on its downtown line authorized by the Commission's order of July 11, 1938, could not constitute a denial of full and fair hearing, since

(a) the evidence tendered for this purpose was incompetent and irrelevant;

(b) Jersey City was estopped from asking the Commission to receive such evidence; and

(c) the Price Administrator, whether or not similarly estopped, had no standing entitling him to ask the Commission to receive such evidence.

VII

The evidence tendered by appellees was irrelevant and incompetent because

(a) the Commission could not legally have limited appellant to its present 8 cent fare merely because appellant, due to increased 1943 traffic, might, under such fare, earn its current bond interest;

(b) the Commission could not legally have limited, nor did it intend to limit, appellant merely to the revenues which the Commission, in its reports of July 11, 1938 and June 8, 1943, estimated appellant would earn under the 8 cent and 9 cent fares there respectively authorized; and

(c) appellees made no offer to prove, nor did the District Court find, that because of appellant's increased 1943 traffic, appellant would earn a fair return on its railroad properties under its present 8 cent fare, or that appellant would earn more than such a fair return under the enjoined fares.

VIII

The Commission, either under Section 1 or Section 15a of the Act, could not, as appellees erroneously contend the Commission intended to do, legally have limited appellant to such fares as would yield merely appellant's current bond interest, since appellant is legally entitled to charge such just and reasonable fares as would enable appellant to earn, as nearly as may be, in view of the competition of other forms of transportation, a fair return on the value of its railroad properties.

IX

Even had appellees' tendered evidence been relevant and competent for the purpose for which it was tendered, Jersey City was not only estopped from asking the Commission to receive the tendered evidence but was estopped from seek-

ing and obtaining an injunction from the District Court based on the Commission's refusal to receive such evidence.

X

While the rule requiring a party to an administrative proceeding to exhaust administrative remedies before resorting to equity is not inflexible and its application rests in the sound judicial discretion of the court to which request is made for equitable relief, the District Court here abused its discretion in according Jersey City an injunction against the Commission's orders, in view of Jersey City's total failure to exhaust its administrative remedies before the Commission either as to such orders or as to such tendered evidence.

XI

The Price Administrator, as representative of the Director of Economic Stabilization under the provisions of the Inflation Control Act of 1942, had no legal interest either before the Commission or before the District Court in the question whether appellant's increased fares authorized by the Commission's enjoined orders were reasonable or otherwise lawful under the Interstate Commerce Act, unless such increased fares contravened the provisions of the Emergency Price Control Act or of the Inflation Control Act.

XII

Where, prior to the making of its enjoined orders, the Interstate Commerce Commission had accorded appellees bona fide and extensive hearings, including the introduction of evidence, the filing of briefs and the making of oral

argument, the Commission's refusal on further hearing to receive merely certain evidence tendered by appellees, or further to re-open the proceedings to receive such evidence, did not constitute a denial of a full and fair hearing to appellees in contravention either of the Interstate Commerce Act or of the due process clause of the Fifth Amendment, so as to justify the District Court, solely on the ground of such refusal, to enjoin the Commission's orders.

XIII

The determination whether the evidence tendered by appellees and rejected by the Commission had a substantial bearing upon the right of appellant to fares higher than those charged on September 15, 1942, was an administrative question within the exclusive jurisdiction of the Interstate Commerce Commission, and as to which the District Court could not substitute its judgment for that of the Commission.

XIV

The determination whether the increased fares authorized by the Commission's enjoined orders violated the economic stabilization program and the efforts of the national government to keep down the cost of living, is an administrative question within the exclusive jurisdiction of the Interstate Commerce Commission, and as to which the District Court could not substitute its judgment for that of the Commission.

XV

The Commission's enjoined orders were supported by adequate findings based on ample evidence.

ARGUMENT

I

THE INJUNCTION ISSUED BY THE DISTRICT COURT AGAINST THE COMMISSION'S ORDERS OF JUNE 8, 1943, AND NOVEMBER 2, 1943, ON THE WHOLLY SPECIOUS GROUND THAT SUCH ORDERS DEPRIVED THE APPELLEES OF A FULL AND FAIR HEARING, WAS AN UNJUSTIFIABLE INTERFERENCE WITH THE COMMISSION'S ATTEMPT, IN A PROPER EXERCISE OF ITS ADMINISTRATIVE DISCRETION, TO CORRECT ITS OWN ERROR.

A. The Commission properly exercised its administrative discretion in limiting the further hearing granted by its order of September 18, 1943 solely to the receipt of evidence as to the impracticability of appellant's collecting a 9 cent cash fare.

B. The Commission further properly exercised its administrative discretion in declining to grant the Price Administrator's motion of October 14, 1943 for further hearing to permit the introduction of evidence tendered in that motion to show that appellant was entitled to no increase whatever in its present 8 cent fare on its downtown line.

The Commission in its report of June 8, 1943, after fully considering the evidence, arguments and briefs of all parties, concluded that appellant was in need of additional revenue beyond that which might be expected from its present fares, and that a portion of such additional revenue should be obtained by increasing the fare on its downtown line from 8 cents to 9 cents during the remaining period

of the war and for six months after its termination.[1] In making these findings the Commission, as it later acknowledged,[2] failed to give due weight to evidence of record[3] showing that it would be impracticable for appellant to collect a 9 cent *cash* fare on its downtown line. This oversight was called to the attention of the Commission by appellant's petition of July 8, 1943, for reconsideration and for such modification of the findings and order of June 8, 1943 as might be "necessary merely to permit practicable compliance by petitioner (appellant) with those findings."[4] Based on such petition and on replies thereto filed by appellees, the Commission by its order of August 3, 1943, without further hearing, modified its prior order so as to permit appellant to charge alternative fares of eleven tokens for $1 or a cash fare of a dime on its downtown line, provided that such alternative fares were also made applicable to appellant's uptown line. In this connection the Commission stated:

> "Apparently on the assumption that the local fare to be approved by us in the prior report for future use on the downtown line would be either the present fare of 8 cents or that proposed of 10 cents, none of the parties stressed the evidence of record with respect to the feasibility of collecting a cash fare of 9 cents, *and it is now apparent that we failed to give to that evidence the weight to which it is entitled.* For the reasons hereinbefore recited, we are convinced that the collection of a 9-cent fare in cash would be impracticable.
>
> * * * * * * *

[1] R. 271.
[2] R. 322.
[3] Tr. 1125-7.
[4] R. 327.

> The substitute fare basis now proposed by respondent, however, with the alternative use of 11 tokens for $1 or a cash fare of a dime, has the advantage of being practical in that it can be conveniently used both by the public and by respondent if made applicable contemporaneously on both the downtown and uptown lines. The approximate use ratio of 90 percent tokens and 10 percent dimes which respondent believes will result, and which we may accept as a reasonable estimate, means that practically all of the regular local commuters on respondent's downtown line will use the tokens and thus pay an average fare of *9 1/11 cents, or about the same as we approved in the prior report. In addition, about 90 percent of the uptown local interstate patrons,* which in all will number about 18,774,000 in 1943, *will obtain a reduction in their fare from 10 to 9 1/11 cents."* (Italics supplied.)[1]

Thereafter, on September 13, 1943, Jersey City filed its *original* complaint,[2] seeking to enjoin the Commission's order of August 3, 1943, on the sole ground that Jersey City had been deprived of its full day in court by not having been given an opportunity to cross-examine witnesses and present evidence in respect of the inability of appellant to collect a 9 cent cash fare. On the basis of such complaint, the Commission on its own motion reopened the proceedings, by its order of September 18, 1943,[3] for the purpose of allowing all parties a hearing on this limited issue. The Commission confined the evidence at the reopened hearings to this limited issue and, having fully considered the testimony and briefs of all parties relevant to this issue, issued

---

[1] R. 322.
[2] R. 1-19.
[3] R. 351-352.

its report and order of November 2, 1943,[1] in which the Commission again found that an alternative fare of eleven tokens for $1 or a cash fare of a dime for local interstate passengers, applicable to both the uptown and downtown lines of appellant, was the only practicable method available by which appellant could reasonably be expected to obtain the additional revenues contemplated by the Commission's report of June 8, 1943.

It thus appears that the Commission's order of November 2, 1943, was a bona fide attempt by the Commission, in the exercise of its administrative discretion, to correct the error which it had made in its report of June 8, 1943, in prescribing a 9 cent cash fare on appellant's downtown line, in the face of evidence that it was impracticable for appellant to collect such a 9 cent cash fare. That the Commission has the power to modify its own order to correct an error, without otherwise reopening the proceedings, needs no argument.[2] We submit that the injunction granted by the District Court against the Commission's orders of June 8, 1943 and November 2, 1943, particularly in the absence of any finding by the District Court that such orders were not supported by adequate findings and substantial evidence, was an unjustifiable interference by the District Court with the proper exercise of the Commission's administrative discretion in this respect.

The ironic result of this interference by the District Court with the Commission's attempt to correct its own error has been to deprive appellant of additional revenues of approximately $1,000 a day,[3] which the Commission

[1] R. 272-285.
[2] *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482.
[3] R. 343.

intended to accord appellant by its report and order of June 8, 1943. Consequently, in the period that has elapsed between the time when appellant might have published and filed a tariff establishing a 9 cent fare on its downtown line, on the one hand, or the alternative fares of eleven tokens for $1 or a cash fare of a dime on both its downtown and uptown lines, on the other hand, and April 30, 1944, appellant has irretrievably lost some $300,000 of badly needed revenues. Moreover, appellant will continue to lose approximately $1,000 a day of additional revenue until the injunction thus improvidently issued by the District Court is dissolved.

A. The Commission properly exercised its administrative discretion in limiting the further hearing granted by its order of September 18, 1943 solely to the receipt of evidence as to the impracticability of appellant's collecting a 9 cent cash fare.

The Commission's order of September 18, 1943, reopened the proceedings for further hearing "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8, 1943."[1] Appellant submits that the limitation imposed by the Commission as to the scope of the reopening afforded by such order constituted an appropriate exercise by the Commission of its administrative discretion.

In the first place, the original complaint of Jersey City, which led the Commission, "out of an abundance of

[1]R. 351.

caution",[1] to reopen the proceedings by its order of September 18, 1943, complained only of Jersey City's having been deprived of its day in court in respect of these limited issues.[2] Jersey City could not have been surprised and cannot now object because the reopened hearing was confined solely to the issues specified in the order of September 18, 1943. These issues were the only issues raised by Jersey City's original complaint.

In the second place, the Commission has the power to determine when and if it will reopen a proceeding before it, and, if it grants a reopening, to limit the scope of such reopening. It is as essential in administrative proceedings as it is in proceedings before courts that the scope of the issues be restricted at the outset and the parties be required to confine their arguments to such issues. As this Court has said, administrative agencies have power themselves "to control the range of investigation."[3] The Commission having determined by its order of September 18, 1943 that the only issue as to which it desired to receive further evidence in order to complete the record before it was the practicability of appellant's collecting a 9 cent cash fare, the determination of this question by the Commission is conclusive and cannot be reviewed by the courts.[4]

---

[1]R. 274.

[2]Paragraph 17 of Jersey City's original complaint, R. 7.

[3]*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-3.

[4]*American Toll Bridge Co.* v. *Railroad Commission*, 307 U. S. 486, 494.

B. The Commission further properly exercised its administrative discretion in declining to grant the Price Administrator's motion of October 14, 1943 for further hearing to permit the introduction of evidence tendered in that motion to show that appellant was entitled to no increase whatever in its present 8 cent fare on its downtown line.

On October 14, 1943, the Price Administrator filed a motion[1] with the Commission requesting that the Commission modify its order of September 18, 1943 and grant a further hearing for the purpose of receiving certain evidence which, the Price Administrator claimed, would show that because of appellant's increased 1943 traffic appellant was entitled to no increase whatever in its present 8 cent fare on its downtown line. Such motion was in fact barred by the Commission's Rules of Practice,[2] since it constituted a petition for reconsideration and modification of the Commission's order of June 8, 1943, authorizing an increase in appellant's present 8 cent fare on its downtown line to 9 cents, and since the time specified in the Commission's Rules for filing such a petition had expired thirty days after the date of such order. Nevertheless, the Commission, waiving its Rules, considered the motion and the evidence tendered thereby. The Commission, in rejecting this motion, stated in its report and order of November 2, 1943:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were

[1] R. 67-70.
[2] See Appendix 1 hereto.

> held, we would feel warranted in modifying our findings as made in the second report * * * the motion will therefore be overruled."[1]

Curiously enough, it is on this very statement by the Commission that the majority below in particular based their finding that appellees were denied a full and fair hearing.

Having quoted this statement in their opinion, the opinion of the majority below proceeds to state:

> "Obviously, from the above language, the Commission was not concerned with the technical niceties of the effort to present the desired testimony. *It actually considered the proposed evidence and decided that, despite it, its decisions should stand.* The municipal plaintiff and the intervenor, by that evidence, offered to show that the carrier's rise in business and net earnings had completely removed any reason for an increase over the eight cent fare. *In refusing to consider such testimony* which, under the terms of its tender went to the heart of the controversy, in our judgment the Commission did act arbitrarily and contrary to the mandate of its statute." (Italics supplied.)[2]

There would seem to be an obvious self-contradiction between the second sentence above quoted, in stating, with relation to the appellees' tendered evidence

> "It (the Commission) actually considered the proposed evidence and decided that, despite it, its decisions should stand"

and the statement in the fourth sentence

> "In refusing to consider such testimony", etc.

---

[1]R. 275.
[2]R. 197.

To do the majority justice, it is probable that the fourth sentence is elliptical and was intended to mean

> "In refusing further hearing to consider such testimony".

However, in Jersey City's amended complaint, this same statement of the Commission is quoted and the complaint expressly alleges:

> "To the extent that the Commission prejudges and prophesies its findings that would result from a hearing not yet held the Commission acts arbitrarily, capriciously and beyond the scope of proper judicial proceeding, and is guilty of an abuse of discretion."[1]

While the majority below do not expressly say so, it must have been on some such theory that the majority held that the Commission's statement shows that the Commission acted "arbitrarily and contrary to the mandate of its statute".

Any such theory is patently absurd. Appellees certainly do not mean to question that the Price Administrator's motion for further hearing placed before the Commission both the tendered evidence and the purpose for which it was tendered. Otherwise, neither under the Commission's Rules of Practice nor on any other basis of orderly procedure would the Commission have been required to give any consideration whatever to the granting of a further hearing to receive such evidence. The tendered evidence and the purpose of its tender being before the Commission and the Commission having, as stated by the

---

[1] R. 35.

majority below, "actually considered it", the Commission like any other tribunal had the right and duty to determine whether it would be justified in granting further hearing to permit the introduction of such evidence.[1] The Commission having considered the tendered evidence and having, again as stated by the majority below, "decided that, despite it, its decisions should stand" could have had no possible reason for granting further hearing for the introduction of such evidence. To this extent, it certainly was the duty of the Commission to "prejudge and prophesy its findings that would result from a hearing not yet held". Such prejudgment and prophesy, far from being "arbitrary, capricious and beyond the scope of proper judicial proceedings and an abuse of discretion" as charged by Jersey City, was a necessary and reasonable exercise of the Commission's administrative powers and duties.[2] Moreover, appellant submits that it was beyond the power of the District Court to substitute its judgment for that of the Commission with respect to the justification for further hearing. The Com-

[1] *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591.

[2] *Baltimore and Ohio R. Co.* v. *United States*, 298 U. S. 349, 389; *Acker* v. *United States*, 298 U. S. 426, 433; *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 481; *United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490, 494. Note that *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U. S. 248, cited by the Court below, is distinguished as unique and contrary to the general rule in *Baltimore and Ohio R. Co.* v. *United States*, *supra*, and in *United States* v. *Northern Pacific Ry. Co.*, *supra*. See also *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U. S. 287, 307, 310, 311, 319; *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U. S. 290, 299; *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 397, 398; *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151, 163, 164.

mission had the right and duty to determine whether the tendered evidence was relevant and competent and whether, if received, it would have required the Commission to disregard all other evidence which would have supported its findings.[1] Appellant submits that under all the authorities cited the Commission's determination in this respect was conclusive.

II

APPELLEES' TENDERED EVIDENCE WAS IRRELEVANT AND INCOMPETENT FOR THE EXPRESS AND SOLE PURPOSE FOR WHICH IT WAS TENDERED.

A. The Commission could not legally have limited appellant to such fares as would yield merely appellant's current bond interest. Appellant is legally entitled to charge such just and reasonable fares as would enable appellant to earn, as nearly as may be, in view of the competition of other forms of transportation, a fair return on the value of its railroad properties. The District Court did not find, nor did appellees contend, that appellant's present 8 cent fare would yield, or the enjoined fares exceed, such fair return.

B. The Commission could not legally have limited, nor did it intend to limit, appellant merely to the revenues which the Commission, in its reports of July 11, 1938 and June 8, 1943, estimated appellant would earn under the 8 cent and 9 cent fares there respectively authorized.

Upon the hearing before the Commission of September 28 and 29, 1943, appellees, for the express and sole purpose

[1] *Pittsburgh Plate Glass Company* v. *N. L. R. B.*, 313 U. S. 146, 163.

of showing that appellant was entitled to no increase whatever over its present 8 cent fare on its downtown line authorized by the Commission's order of July 11, 1938, either to the 9 cent fare authorized by the Commission's order of June 8, 1943, or to the alternative fares of 11 tokens for $1 or a cash fare of a dime authorized by the Commission's order of August 3, 1943, attempted to present certain evidence and indulge in certain cross-examination.[1]

Appellees claimed that such tendered evidence would show that appellant was entitled to no increase in its present 8 cent fare on its downtown line because, due to appellant's increased 1943 traffic, appellant's net revenues would so increase that without any increase in such 8 cent fare (1) appellant would earn its current bond interest, (2) appellant would earn "more than" the revenue which the Commission had, in its report of July 11, 1938, estimated appellant would earn under the 8 cent fare authorized by its order of that date, and (3) appellant would earn "more than" the revenue which the Commission had, in its report of June 8, 1943, estimated appellant would earn under the 9 cent fare authorized by its order of that date. Appellees claimed that it was the Commission's intention to limit appellant to such estimated revenues.[2]

The only specific evidence in this respect offered by appellees was a condensed income statement of the Hudson & Manhattan Railroad Company for the seven months ending July 31, 1943, in comparison with the same months of 1942.[3] Except for the fact that this exhibit covered two additional months of 1943, it was identical with an exhibit

---

[1]Tr. 2144-51, 2215-29, 2446-50.
[2]Tr. 2149-50, 2449-50.
[3]Tr. 2446-50, R. 66.

attached to the Price Administrator's unsworn reply[1] to appellant's sworn petition of July 8, 1943, for reopening and modification of the Commission's order of June 8, 1943. In the Commission's report of August 3, 1943, based on such sworn petition of appellant and the unsworn replies of the Price Administrator and Jersey City, the Commission rejected the exhibit then offered, which covered the first five months of 1943 in comparison with the same months of 1942. The ground for rejection was that the exhibit was not a condensed statement of appellant's income from its railroad operations, but included, without any segregation, appellant's income from its office building operations, and therefore was of no probative value as to appellant's income from its railroad operations.[2]

Appellees endeavored to cross-examine appellant's witnesses with respect to appellant's income and expenses attributable to railroad operations for the first seven months of 1943.[3] The principal matter to which such cross-examination was directed was the reasonableness of the war contingency reserve of $240,000 a year, which appellant had set up by a $20,000 monthly charge to operating expenses for self-insurance against extraordinary war hazards. The reasons which had led appellant to set up this reserve had been the subject of testimony[4] at the hearings before the Commission in 1942, and the Commission had found in its report of June 8, 1943, that[5]

---

[1]R. 364.
[2]R. 324-325.
[3]Tr. 2144-51, 2215-29.
[4]Tr. 1264-5.
[5]R. 267.

> "Respondent's annual operating costs have increased since 1937 by about $671,500 and since 1941 by about $466,500, including the war contingency reserve of $240,000 a year for protection against extraordinary war hazards, *which we may accept as reasonable,* even though none of it had been used at the time of the further hearing, or more than 9 months after the entrance of this country into the war, and only $20,000 thereof (used to defray the portion not covered by insurance of the expenses occasioned by the derailment at Exchange Place in April, 1942, previously referred to) had been used at the time of the oral argument in April, 1943. (Italics supplied.)[1]

At the hearing on September 28, 1943, counsel for the Price Administrator attempted to cross-examine appellant's witnesses as to the justification for this war contingency reserve, in comparison with what he alleged to be the lower cost of War Damage Corporation insurance.[2] At the hearing on September 29, 1943, counsel for the Price Administrator produced a witness who testified that appellant might

---

[1]The Commission's observation as to the extent to which this reserve had been used up to the time of the oral argument is erroneous. Counsel for appellant had expressly stated at the oral argument (Tr. 1942-44) that $20,000 *a month* had been used in reducing the incursion on appellant's insurance reserve in connection with the derailment which had occurred at appellant's Exchange Place Station on April 26, 1942, in which several passengers were killed and many were injured. The Commission's error was further corrected by the testimony of appellant's comptroller, Mr. Fritsch, on September 28, 1943, when he testified (Tr. 2216-18) that at the time of the oral argument an aggregate of $180,000 had been credited to this reserve and that $125,000 thereof had been expended in connection with the Exchange Place derailment.

[2]Tr. 2144-50.

obtain insurance from War Damage Corporation at the rate of 18¢ per $100 of coverage against damage resulting from enemy attacks or from efforts of the United States forces in repelling enemy attacks.[1] Since such war damage insurance would not, as the witness admitted,[2] have protected appellant against the war hazards to which it was subject by reason of the speed-up in war traffic and the drafting of experienced employees, this evidence was of no probative value as to the reasonableness of appellant's reserve.

The Examiner refused to receive the condensed income statement of the appellant for the seven months ended July 31, 1943, and refused to permit cross-examination of the appellant's witnesses with respect to appellant's net income from railroad operations for the seven months ended July 31, 1943, on the ground that such evidence was not within the scope of the Commission's order of reopening of September 18, 1943.[3] That order limited the evidence which might be received on further hearing to evidence relating solely "to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943",[4] *i.e.*, the modifications by its order of August 3, 1943, permitting alternative fares of 11 tokens for $1, or a cash fare of a dime, in lieu of the 9 cent fare authorized by the Commission's order of June 8, 1943. The Examiner, however, advised the appellees that they might petition the Commission

[1]Tr. 2450-52.
[2]Tr. 2451-52.
[3]Tr. 2034-6, 2144-51, 2215-29, 2446-50.
[4]R. 351.

in accordance with the Commission's Rules of Practice for a broadening of the Commission's order of September 18, 1943, so as to permit the receipt of the tendered evidence and cross-examination.

As already stated, the Price Administrator did file such a petition in the form of his motion of October 14, 1943, but Jersey City never filed any such petition, though it did, after appellant's reply of October 25, 1943, to the Price Administrator's motion, attempt by its letter to the Commission dated October 25, 1943, to adopt the Price Administrator's motion. This letter the Commission ignored as not being in compliance with its Rules of Practice.

Waiving, for the moment, the Price Administrator's lack of right under his intervention to tender such evidence at all, the failure of Jersey City to make any such tender in conformance with the Commission's Rules of Practice, and the estoppel of both Jersey City and the Price Administrator to tender such evidence at all, appellant desires here to show that the tendered evidence was wholly incompetent and irrelevant for the sole purpose for which it was tendered.

A. The Commission could not legally have limited appellant to such fares as would yield merely appellant's current bond interest. Appellant is legally entitled to charge such just and reasonable fares as would enable appellant to earn, as nearly as may be, in view of the competition of other forms of transportation, a fair return on the value of its railroad properties. The District Court did not find, nor did appellees contend, that appellant's present 8 cent fare would yield, or the enjoined fares exceed, such fair return.

Counsel for appellant confess they do not even understand the grounds of Jersey City's contention that the Com-

mission would have been required to limit appellant to its present 8 cent fare prescribed by the Commission's order of July 11, 1938, had Jersey City been permitted to show by its tendered evidence that because of appellant's increased 1943 traffic appellant under that fare might earn net revenues sufficient to pay its current bond interest.[1] Neither do counsel understand on precisely what basis the majority below assumed the validity of this contention as a ground for their holding that the Commission's refusal to receive the evidence tendered by Jersey City in this respect was a denial of a full and fair hearing.

Apparently the theory adduced by Jersey City and adopted by the District Court was that the proceedings before the Commission were under Section 15a of the Act (the so-called "revenue section") and that therefore the Commission was limited to according appellant only such revenues as would meet its minimum needs, which Jersey City assumed to be revenues sufficient merely to meet appellant's current bond interest. Neither the Court nor Jersey City, however, cited any authority for such a construction of Section 15a. Moreover, it is to be noted that the Commission's orders of June 8, 1943 and November 2, 1943 were expressly amendments to its order of July 11, 1938, which order was specifically based on Section 1 *and* Section 15a of the Act.[2]

Indeed, counsel feel that the time of this Court would be wasted by any further analysis of the grounds of Jersey City's contention, or of the assumption of its validity by the

---

[1]The Price Administrator's tender of evidence was not made with any specific relation to the amount of interest which appellant might earn on its bonds (Tr. 2449-50). The only specific tender in this respect was that of Jersey City (Tr. 2149-50).

[2]R. 311.

majority below, since whatever its basis that contention is clearly erroneous in law.

It is beyond question that appellant is entitled to charge such just and reasonable fares as would yield appellant a fair return on its investment if, under just and reasonable fares, it can earn such a return. The only limitation upon the appellant's right in this respect is that recognized by this Court in *Public Service Commission of Montana* v. *Great Northern Utilities Company*, 289 U. S. 130. There this Court held that despite this unquestioned right, a regulatory body is not required to assure a public utility of such fair return where, because of competitive conditions, it is impossible to earn such fair return under just and reasonable rates. This, however, is far from holding that a regulatory body must deny a public utility the right to charge such just and reasonable rates as, in view of competitive conditions, will, as nearly as possible, yield a fair return.

Here, the Interstate Commerce Commission has specifically found that both the 9 cent fare authorized by its order of June 8, 1943, and the alternative fares of 11 tokens for $1 or a cash fare of a dime, are just and reasonable fares. It has, moreover, specifically found that upon the evidence of record such fares will not yield substantially more, but probably less, than appellant's current bond interest.

In the Commission's report of June 8, 1943, the Commission found that under the 9 cent fare on appellant's downtown line there authorized, appellant would earn

> "a probable annual net income available for interest on the bonds allocable to the railroad properties of $2,181,460. Deducting the annual interest of

> $1,363,906 on the first two bond issues would thus leave about $817,554 for payment on the adjustment income bonds, equivalent to interest thereon at the rate of 3.473 per cent."[1]

Moreover, it is to be noted that this estimate by the Commission of appellant's probable annual net income under a 9 cent fare was based on an exhibit received by the Commission upon the oral argument preceding its order of June 8, 1943 upon the stipulation of all parties,[2] but at the request of appellees. This exhibit showed appellant's increase in traffic for January and February of 1943.[3] The Commission equated these increases to a 12 months' basis and, on a formula as to increase in operating expenses incident to such increased traffic agreed to by all parties,[4] made its estimate of appellant's probable revenues under the 9 cent fare there authorized.

In the Commission's report of November 2, 1943, the Commission expressly found that under the alternative fares there authorized of 11 tokens for $1 or a cash fare of a dime applicable both to appellant's uptown and downtown lines, appellant would earn no more and probably less net revenue than under the 9 cent fare on appellant's downtown line authorized by the Commission's order of June 8, 1943, combined with appellant's present and authorized 10 cent fare on its uptown line. The Commission said in this connection:

> "Based upon the number of local interstate passengers carried by respondent in the first 8 months of 1943, adjusted to a 12-month basis, and assuming

---

[1] R. 268.
[2] R. 257, 275.
[3] R. 410-411.
[4] Tr. 1888-9.

a 5 per cent loss in the downtown local passengers by reason of an increase in the fare, the proposed alternative basis can be expected to bring to respondent at least no greater gross or net revenue than would result under cash fares of 10 cents uptown and 9 cents downtown, if both of such fares were collectible, as contemplated by our findings in the second report. If such estimate were based upon a use ratio of 90 per cent tokens and 10 per cent dimes, as respondent claims it should be, the result would approximate $85,000 less annual revenue under the alternative basis than under the 10-cent and 9-cent cash fares."[1]

It is further to be noted that this estimate by the Commission of appellant's probable net income under the alternative fares authorized by its order of November 2, 1943 was expressly based upon the exhibits already referred to introduced by appellant on the hearing of September 28, 1943, showing appellant's actual local interstate passenger traffic and revenues for the eight months ended August 31, 1943, and its local interstate passenger traffic and revenues for the eight months ended August 31, 1943, equated to a twelve months' basis.[2]

On the hearing before the District Court, counsel for Jersey City insisted that the Commission could make no valid estimate on the basis of such exhibits, because they did not include appellant's increased 1943 joint service traffic with the Pennsylvania Railroad. However, the Commission had before it at the time it made its order of June 8, 1943, the increase in appellant's total traffic, including its joint service traffic, up to and including February, 1943. In the Commission's report of June 8, 1943, the Commis-

[1]R. 279.
[2]Tr. Exs. F-148, F-149, and F-150.

sion had made an estimate as to the increase in appellant's traffic and revenues reasonably to be expected for the entire year 1943 based on an equation for the twelve months of 1943 of the increase in all traffic for the first two months of that year, including the increase in joint service traffic.[1] Even had the Commission had before it the actual increase in joint service traffic, as well as of other traffic, for the eight months of 1943, it would still have had to use an equated figure to reach an estimate as to appellant's anticipated increase in all traffic and revenues for that year. Consequently, it must be assumed that the Commission gave full weight to the probable revenue result to the appellant of any increase in its 1943 joint service traffic in reaching its conclusion that under its order of November 2, 1943, appellant would earn no more, and probably less, than under its order of June 8, 1943.

Moreover, it is again to be emphasized that neither before the District Court nor before the Commission did Jersey City claim that any or all such tendered evidence would have shown more than that appellant, under its present 8 cent fare, would earn its current bond interest; furthermore, at no time, either before the Commission or before the District Court, did either of the appellees claim that the tendered evidence would have shown that, under its present 8 cent fare, appellant would have earned a fair return on its railroad property, or under the enjoined fares would have earned in excess of such fair return.

Assuming therefore that appellees' tendered evidence and cross-examination would have established all appellees claim for it, *i.e.*, that under its present 8 cent fare appellant would earn its full current bond interest, this would still

---

[1]R. 268-269.

leave appellant far short of earning a fair return on its railroad properties. Appellant's full current bond interest as of August 31, 1942 on its $50,899,418 of bonded indebtedness allocable to railroad properties as of that date was $2,591,053.30.[1] The undisputed cost of its railroad properties as of August 31, 1942 was $66,541,352.08.[2] Should appellant earn its full current bond interest, this would represent a return of 3.82% on the admitted cost of its railroad properties, which cost the record shows to be far below the reproduction cost new less depreciation.[3]

B. The Commission could not legally have limited, nor did it intend to limit, appellant merely to the revenues which the Commission, in its reports of July 11, 1938 and June 8, 1943, estimated appellant would earn under the 8 cent and 9 cent fares there respectively authorized.

The Price Administrator's tender of evidence to show that the Commission was warranted in permitting no increase whatever in appellant's 8 cent fare was limited to an offer to prove that, as a result of the war, the earnings of the appellant at an 8 cent fare for the full year of 1943 would exceed "the amount which the Commission found to be adequate and reasonable" in its order of July 11, 1938, and in its order of June 8, 1943.[4] Jersey City made no spe-

---

[1]Tr. Ex. 26-R Supp.

[2]R. 252, Tr. Ex. 26-R Supp.

[3]R. 252.

[4]The offer of proof on behalf of the Price Administrator was as follows:

"Mr. Booth: I am not going to read any figures; I am merely going to state what the Commission stated, that the——

May I state this, then? That in its 1938 order in this case the Commission estimated that the earnings of the com-

cific offer of evidence in this respect.[1] However, it is fair to say that Jersey City's offer to prove that due to 1943 increased traffic appellant would earn its full current bond interest would necessarily include proof that appellant would earn more than the Commission estimated in either of its orders, since in both orders the Commission estimated appellant would earn *less* than its current bond interest.

Later appellant will show that the Price Administrator had no standing to offer any evidence whatever in this respect. It desires here, however, to discuss the evidence

---

pany would be a certain figure under the eight-cent fare; in its June 8th order the Commission estimated the earnings of the company would be a certain amount under the nine-cent fare; if we were given an opportunity to demonstrate by the presentation of evidence in this hearing we would show that the current earnings of the company at the eight-cent fare and for the full year 1943 will exceed either of the amounts which the Commission found to be adequate and reasonable in these two previous orders and that if an adjustment were made for items of expenses which we believe to be without foundation or reason that the earnings would still be substantially higher, and that is proof that we would present if we were given an opportunity to do so." (Tr. 2449-50)

[1]The offer of proof on behalf of Jersey City was as follows:

"Mr. Eisen: Inasmuch as you have made the ruling, Mr. Examiner, I make an offer of proof to the effect that I have a witness here that was ready, able and willing and would have testified in due time, that the situation of the Hudson & Manhattan Railroad for the first six months of this year as such, that it reflects an increase of 30 per cent. in patronage over 1941, the corresponding period of 1941, that the H. & M. Railroad has testified that under existing fares of 9 and 10 cents a 30 per cent. increase in patronage would be required to enable them to meet interest on their bonded indebtedness, and that therefore as reflected by the first six months of this year, there was no need, in so far as revenue is concerned, for any prescription of any rate in excess of 8 cents." (Tr. 2149-50)

tendered, whether it be considered that of the Price Administrator or that of Jersey City, to show that the Commission could not legally have limited appellant to the revenues the Commission estimated appellant would earn either under its order of July 11, 1938, or its order of June 8, 1943, and therefore the offer of such evidence was irrelevant to establish that the Commission could not legally authorize any increase in appellant's present 8 cent fare.

The Commission, in its report of July 11, 1938, estimated that, under the 8 cent fare on appellant's downtown line to which its order of the same date limited appellant, appellant's

> "* * * net income available for bond interest * * * would be about $2,260,817"[1]

The Commission found that this would represent a rate of return of 3.4% on the basis of original cost and 3.31% on the basis of depreciated reproduction cost new.[2] In the Commission's report of June 8, 1943, the Commission stated that such estimated revenues under its order of July 11, 1938 were

> "approximately $541,000 less than the amount which we found would be necessary to meet increased operating expenses, increased taxes, and current interest on the railroad portion of the outstanding bonds."[3]

Moreover, in such later report, the Commission found that appellant, instead of earning under such 8 cent fare only $541,000 less than its current bond interest, had earned in

---

[1] R. 311.
[2] R. 311.
[3] R. 256.

1938, $1,113,350, in 1939, $806,048, in 1940, $817,424, and in 1941, $892,148, less than its current bond interest and further, that as a consequence, appellant's cumulative and unpaid interest on its Adjustment Income Bonds as of December 31, 1941 had risen to $5,494,727 (instead of $2,118,746 as of December 31, 1937).[1] It is particularly to be noted that the interest on appellant's Adjustment Income Bonds is a fixed charge which, to the extent the same is unpaid, becomes enforceable by foreclosure at the maturity of said Bonds in 1957.[2]

It is, of course, ridiculous to suggest that the Commission, by its report of July 11, 1938, prescribing an 8 cent fare on appellant's downtown line, intended to limit appellant to earning $541,000 less than its current bond interest, not to speak of the far greater amounts by which in succeeding years appellant failed to earn such interest. The Commission's report plainly shows that its estimate was made for the purpose of justifying its denial of appellant's proposed 10 cent fare on its downtown line, based on the Commission's conclusion in its report that, because of diversion which would be incident to any increase in its fare, due to the competition of other forms of transportation, appellant would earn more under the prescribed 8 cent fare than under its proposed 10 cent fare.[3] The Commission, therefore, proceeded to estimate what appellant might earn under the 8 cent fare then prescribed as a basis for its conclusion that such fare would yield appellant more revenue than a 10 cent fare.

---

[1]R. 251.

[2]Tr. Ex. 23.

[3]R. 310-311.

Again, it is virtually impossible to understand the basis of appellees' contention either that the Commission intended to, or had the power to, limit appellant to the revenues which the Commission estimated such 8 cent fare would yield. It seems to be based upon some bizarre interpretation placed by appellees on the prior refusal of the District Court to grant appellant an injunction against the Commission's order of July 11, 1938 restricting appellant to an 8-cent fare on its downtown line, and the affirmance by this Court of the District Court's refusal in this respect. Again, it is not worth while to attempt to follow appellees' "reasoning". It will suffice to say that all the District Court did was to hold there was evidence before the Commission to support the Commission's order restricting appellant to an 8 cent fare on its downtown line, and that this Court affirmed the District Court on the same ground. It is perfectly clear that, had the Commission determined by its report and order of July 11, 1938 to authorize appellant's proposed 10 cent fare, the District Court and this Court, had appellees sought to enjoin such an order, would have sustained it for the same reason that the Commission's actual order was sustained, *i.e.* that there was evidence before the Commission to support its order. It can hardly be claimed that there was no such evidence, in view of the fact that three Commissioners dissented from the order of July 11, 1938, and have persisted in dissenting from the Commission's later orders insofar as they deny appellant a 10 cent fare on its downtown line, on the very ground that there was ample evidence before the Commission to sustain such a fare.

What appellees basically do not understand is the real scope of this Court's decision in affirming the District

Court's denial to appellant of an injunction against the Commission's order of July 11, 1938, limiting appellant to an 8 cent fare on its downtown line. That decision merely served to make abundantly clear that this Court meant exactly what it said in its prior decisions there cited, that is, that if there is any evidence whatever before the Commission to sustain its findings and order, the courts were without power to set aside such findings and order, even though there was other equally competent evidence before the Commission against them, and even though the Court might disagree with the Commission as to the conclusion to be drawn from all the evidence.

What has just been said with relation to the Commission's estimate of revenues under its order of July 11, 1938, applies equally to the estimate of revenues which the Commission made in its report of June 8, 1943, with reference to the 9 cent fare there prescribed. There the Commission estimated that under such 9 cent fare appellant would earn approximately $2,404,502, or at the rate of 4.42% on its 5% Adjustment Income Bonds.[1] This would be $186,552 less than the full interest on such Bonds.

---

[1]R. 269.

III

JERSEY CITY WAS ESTOPPED BOTH FROM ASKING THE COMMISSION TO RECEIVE THE TENDERED EVIDENCE AND FROM SEEKING AND OBTAINING AN INJUNCTION FROM THE DISTRICT COURT BASED ON THE COMMISSION'S REFUSAL TO RECEIVE SUCH EVIDENCE.

INTERWOVEN WITH, AND IN REALITY A PART OF SUCH ESTOPPEL, WAS JERSEY CITY'S TOTAL FAILURE TO EXHAUST ITS ADMINISTRATIVE REMEDIES BEFORE THE COMMISSION.

The estoppel against Jersey City from asking the Commission to receive the tendered evidence, designed to show that appellant was entitled to no increase whatever over its present 8 cent fare prescribed by the Commission's order of July 11, 1938, and from seeking and obtaining an injunction against the Commission's orders, based on the Commission's refusal to receive such evidence, arises primarily from the nature of Jersey City's *original* complaint before the District Court, preceding the amended complaint upon which that Court enjoined the Commission's orders of June 8, 1943 and November 2, 1943. Interwoven with and forming part of such estoppel, however, is the total failure of Jersey City to avail itself of any of its administrative remedies before the Commission with respect to the Commission's enjoined orders authorizing the respective increases over such present 8 cent fare.

The full nature of this estoppel can best be understood by a chronological consideration of Jersey City's conduct, and incidentally that of the Price Administrator, before the

Commission and the District Court, relating both to appellant's present 8 cent fare and to the Commission's authorized increases in that fare, first to 9 cents and then to the alternative fares of 11 tokens for $1 or a cash fare of a dime.

The chronology of Jersey City's conduct and that of the Price Administrator in this respect has been fully set out in the STATEMENT OF THE CASE, and therefore will not be repeated here. Appellant submits that the details of such conduct as there shown at pages 10 to 21 demonstrate that Jersey City was clearly estopped from asking the Commission, on the further hearing of September 28 and 29, 1943, to receive the evidence tendered by appellees or to permit their attempted cross-examination, both intended to show that because of appellant's increased 1943 traffic and revenues the Commission was not warranted in granting appellant any increase whatever over its existing 8 cent fare, either to the 9 cents authorized by the Commission's order of June 8, 1943 or the alternative fares authorized by the Commission's order of August 3, 1943.

Appellant submits that Jersey City was clearly estopped from asking the Commission to receive such evidence and to permit such cross-examination (1) by reason of the specific allegations and prayer of its *original* complaint by which the Commission had been induced to make its order of reopening and further hearing to meet the allegations and prayer of such complaint; (2) by reason of Jersey City's failure within the time and manner specified by the Commission's Rules of Practice to ask reopening or reconsideration of the Commission's order of June 8, 1943, authorizing the 9 cent fares; and (3) by reason of the fact that Jersey City, in its reply of July 14, 1943, to appellant's

petition of July 8, 1943, for modification of the Commission's order of June 8, 1943, had asked the Commission for further hearing only as to appellant's disability to collect a 9 cent cash fare and not as to the validity of the 9 cent fare, itself.

Appellant submits, moreover, that this estoppel might well be extended to the Price Administrator by reason of his acceptance of the opportunity offered him by the Commission to participate in the further hearing thus induced by Jersey City.

Appellant will now proceed to show that both on the foregoing grounds and by reason of Jersey City's subsequent conduct before the Commission, Jersey City was furthermore estopped from filing its amended bill of complaint on which the District Court granted the injunction here appealed from. The facts as to Jersey City's conduct before the Commission subsequent to the hearing of September 28 and 29, 1943, and prior to the filing of its amended complaint herein asking an injunction against the Commission's orders of June 8, 1943 and November 2, 1943, are fully set out at pages 21 to 27 of the STATEMENT OF THE CASE, and there therefore would seem to be no occasion to repeat them here.

As already stated, the only substantial ground which Jersey City alleged in its amended complaint for such an injunction was that the Commission had denied Jersey City a full and fair hearing, particularly by refusing further to reopen the proceedings to receive the tendered evidence and cross-examination rejected on the hearing of September 28 and 29, 1943.

Appellant, in submitting that Jersey City was estopped from filing its amended complaint in the District Court

asking an injunction against the Commission's order on such a ground, and that such complaint was in any event premature, is appealing for no harsh or technical application either of the doctrine of estoppel or of the rule that administrative remedies must be exhausted before resort is had to the courts.

Indeed, appellant invokes against Jersey City the rule requiring the exhaustion of administrative remedies only because Jersey City's conduct in this respect was such as in itself to create an estoppel, irrespective of the major element of estoppel supplied by the nature of the allegations and prayer of Jersey City's original complaint. In other words, Jersey City not only failed within the time and manner specified in the Commission's Rules of Practice to petition for any reopening of the Commission's order of June 8, 1943 authorizing the 9 cent fare, but in its reply to appellant's petition for reconsideration and modification of that order so as to permit alternative fares, Jersey City's suggestion of further hearing was expressly limited to the justification for such alternative fares instead of such 9 cent fare, and there was no suggestion whatever of further hearing as to the justification for the 9 cent fare itself.

While, therefore, appellant recognizes that the rule requiring exhaustion of administrative remedies before appeal is made for judicial relief is not inflexible, the facts here afford no justification for departing from that rule as stated by this Court in *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-51, as

> "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

Furthermore, this Court's attention is respectfully called to what was said by the District Court itself in this respect, in *Board of Public Utility Commissioners of N. J.* v. *U. S.*, 21 F. Supp. 543, where that Court said, p. 549:

> "All parties to the proceeding are entitled to file their exceptions to the proposed report, and as a matter of practice the Commission accepts as sound and accurate, and as supported by the evidence, all findings of fact in the proposed report to which no exceptions are made. In the instant case plaintiff filed exceptions but made no objection as to the sufficiency of the findings. Under the Commission's Rules of Practice (Rule XV) it is permissible for any party, after decision, to apply for a rehearing for the taking of additional testimony, for reargument, or for reconsideration. Plaintiff did not apply to the Commission for rehearing in this case. By petition for such rehearing the way was open to plaintiff to urge upon the Commission the argument which it now presents for the first time to the court as to alleged insufficiency of the findings. It should have exhausted its remedies before the Commission before appealing in this respect to the court."

Entirely aside, however, from any question of Jersey City's failure to exhaust its administrative remedies, there is a clear case of equitable estoppel against Jersey City's right to raise, either before the Commission or the District Court, the question whether the Commission was justified in granting any increase whatever over appellant's present 8 cent fare prescribed by the Commission's order of July 11, 1938. Jersey City before filing its amended complaint before the District Court, had at least three appropriate

opportunities to raise that question, two before the Commission and one before the District Court itself, and not only failed to do so, but instead raised entirely different questions.

Jersey City's first opportunity to raise that question was when the Commission for the first time authorized an increase in appellant's 8 cent fare by its report and order of June 8, 1943, according appellant a 9 cent fare. As has been seen, Jersey City not only failed to file any petition for reconsideration or modification of that order, but in its reply to appellant's petition for reconsideration and modification, suggested further hearing only as to the justification for permitting any increase in the 9 cent fare to the alternative fares asked by appellant, and suggested no hearing whatever as to the justification for the 9 cent fare itself.

The second appropriate opportunity for Jersey City to have raised such question before the Commission was upon the issuance of the Commission's order of August 3, 1943, authorizing the alternative fares. Jersey City then had the right, as soon as appellant published such fares, to apply to the Commission for suspension of them, and to raise the question whether any increase whatever over appellant's existing 8 cent fare was justified.

The third appropriate opportunity for Jersey City to have raised that question was when, on September 13, 1943, Jersey City filed its *original* complaint in the District Court asking an injunction against the Commission's order of August 3, 1943. Surely if Jersey City were ever to raise the question whether the Commission was justified in permitting any increase whatever over appellant's present 8 cent fare prescribed by the Commission's order of July 11, 1938, it was when Jersey City filed its original complaint.

The Commission's order of June 8, 1943, authorizing an increase in such 8 cent fare to a 9 cent fare, was then in effect and had then been in effect for some three months. The only reason the 9 cent fare itself was not in effect, was the physical impossibility of the collection of a 9 cent *cash* fare with appellant's fare collection boxes. Moreover, on September 13, when the original complaint was filed, there was available to Jersey City substantially the same evidence with reference to appellant's 1943 increased traffic and revenues as the Price Administrator tendered a few days later at the further hearing on September 28, 1943, under the Commission's order of reopening of September 18, 1943. Furthermore, it has been seen that such order of reopening was made by the Commission for the very purpose of satisfying the allegations of Jersey City's original complaint that Jersey City had been denied a full and fair hearing. The only denial, however, of full and fair hearing alleged in the original complaint was as to the justification for the Commission's order of August 3, 1943 in permitting an increase to the alternative fares from the 9 cent fare authorized by the Commission's order of June 8, 1943 because of the physical limitations of appellant's fare collection boxes. There was no allegation in the original complaint of any denial of a full and fair hearing to Jersey City in connection with the 9 cent fare itself, or any allegation that the Commission was not warranted in authorizing the increase over appellant's existing 8 cent fare to the 9 cent fare already authorized. On the contrary, Jersey City's original complaint implicitly and explicitly asked that the appellant Commission and the appellant Railroad Company be restrained from departing from such 9 cent fare.

Moreover, when the Commission by its order of September 18, 1943, reopened the proceedings and granted further hearing expressly for the purpose of permitting Jersey City to present evidence and to cross-examine as to the justification for the Commission's order of August 3, 1943 in permitting an increase to the alternative fares from the 9 cent fare authorized by the Commission's order of June 8, 1943 because of the physical limitations of appellant's fare collection boxes, Jersey City presented not one word of evidence in this respect. Instead, Jersey City for the first time raised the question, and for the first time tendered evidence purporting to show, that neither in the Commission's order of August 3, 1943, nor in its order of June 8, 1943, was the Commission justified in permitting any increase whatever over appellant's existing 8 cent fare authorized by the Commission's order of June 11, 1938.

Accordingly, appellant respectfully submits that not only was appellees' evidence, tendered for the sole purpose of showing that the Commission was unwarranted in authorizing any increase whatever in appellant's existing 8 cent fare, incompetent and irrelevant for that purpose, as shown under Point II of this argument, but that even had it been competent and relevant, Jersey City was estopped both from asking the Commission to receive that evidence and from seeking and obtaining an injunction against the Commission's orders because of the Commission's refusal to receive such evidence.

It has been noted that although appellant raised this question of estoppel before the District Court at the final hearing on the amended complaint, the only reference which

the majority of that Court made to that question was to say:

> "We do not see that the contentions raised by defendants that plaintiffs are estopped from questioning the validity of the orders of June 8, 1943 and November 2, 1943; and that the action is prematurely brought, are answers to the above" (*i.e.*, denial of full hearing).[1]

Apparently the majority wholly confused the question of estoppel with the question of failure to exhaust administrative remedies. (See the Court's finding of fact No. 30.)[2] In any event, the majority made no reference whatever to the facts which have been here set out.

Appellant respectfully submits that in this respect the majority of the Court below erred, and that on this ground alone this Court would be warranted in reversing their order granting Jersey City an injunction under its amended complaint.

Appellant believes it unnecessary further to protract discussion of the question of estoppel to consider whether such estoppels against Jersey City extend to the Price Administrator, since, as appellant will now show, the Price Administrator, on this record, had no standing in any event to ask the Commission to receive the tendered evidence.

---

[1]R. 198.
[2]R. 216.

IV

THE PRICE ADMINISTRATOR, HAVING NOT ONLY FAILED TO OFFER ANY EVIDENCE WHATEVER BEFORE THE COMMISSION THAT THE INCREASED FARES AUTHORIZED BY THE ENJOINED ORDERS WOULD RESULT IN INFLATION, BUT HAVING EXPRESSLY CONCEDED TO THE CONTRARY, THE COMMISSION'S REFUSAL TO RECEIVE THE EVIDENCE TENDERED BY THE PRICE ADMINISTRATOR, TO SHOW THAT BECAUSE OF APPELLANT'S INCREASED 1943 REVENUES THE COMMISSION WAS NOT WARRANTED IN PERMITTING ANY INCREASE WHATEVER OVER APPELLANT'S PRESENT 8 CENT FARE, COULD NOT CONSTITUTE A DENIAL OF FULL AND FAIR HEARING TO THE PRICE ADMINISTRATOR, OR WARRANT THE DISTRICT COURT ON THAT GROUND IN ENJOINING THE COMMISSION'S ORDERS.

THE DISTRICT COURT WAS LIKEWISE UNWARRANTED IN ENJOINING THE COMMISSION'S ORDERS ON THE GROUND THAT THE COMMISSION HAD "LIGHTLY BRUSHED ASIDE" THE CONTENTION OF THE PRICE ADMINISTRATOR THAT THE INCREASED FARES THEREBY AUTHORIZED VIOLATED THE NATIONAL EMERGENCY POLICY OF ECONOMIC STABILIZATION.

Had the Price Administrator tendered any competent evidence to the Commission that the increased fares authorized by the enjoined orders of June 8, 1943 and November 2, 1943 would result in inflation or in increased cost of living, and had the Commission refused to receive such evidence, appellant does not question that the District Court would have been justified in enjoining the Commission's orders.

The Price Administrator, however, with full opportunity to do so, neither presented nor tendered a word of evidence in this respect. On the contrary, the Price Administrator, in his exceptions to the Examiner's proposed report[1] preceding the Commission's order of June 8, 1943, which proposed report recommended that a 10 cent fare be authorized on appellant's downtown line, expressly conceded that

> "We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine."[2]

It is true that in those exceptions the Price Administrator did argue that such increase in fare, together with other increased costs of living, would result in what the Price Administrator termed an "inflationary spiral". At no time, however, did the Price Administrator present or offer any evidence whatever to support this argument, either as to what were such other increased costs of living, or as to how such increased costs of living, combined with appellant's proposed increased fare, could result in an "inflationary spiral". Instead, the Price Administrator confined both his evidence and his efforts, except for desultory references to the question of inflation, to an attempt to show that under the Interstate Commerce Act the Commission was not justified in permitting any increase in appellant's present 8 cent fare.

Paradoxically, it was the Price Administrator, who had no legal interest in this question, who alone made a

---

[1] H. & M. Ex. D-8.
[2] R. 378.

proper tender of such evidence to the Commission by his motion of October 14, 1943, asking the Commission to broaden its order of reopening of September 18, 1943 to receive such evidence. Jersey City, it has been shown, not only failed properly to join in such motion, but was estopped to do so.

That the Price Administrator had no standing before the Commission entitling him to tender such evidence, and that the Commission's refusal to receive such evidence could not therefore constitute a denial of full and fair hearing to the Price Administrator, is clear from the opinion of this Court in *Vinson et al.* v. *Washington Gas Light Company et al.*, decided March 27, 1944, U. S.

Indeed, so far as the Price Administrator is concerned, his case is on all fours with the *Washington Gas Light* case, except for the unessential distinction that here orders of the Interstate Commerce Commission relating to fares of a common carrier were involved, while there orders of the Public Utilities Commission of the District of Columbia relating to rates of a public utility were in question.

Moreover, appellant in the present case, not content with the Price Administrator's disclaimer[1] that appellant's proposed increased fares could result in inflation, itself made an affirmative showing to the contrary.[2]

Appellant showed before the Interstate Commerce Commission that even its proposed straight 10 cent fare on its downtown line, which the Commission refused to authorize either by its orders of June 8, or November 2, 1943, could result in a maximum increase in living costs

---

[1]R. 378.

[2]H. & M. Ex. D-10.

to passengers on its downtown line of $12.48 a year or $1.04 a month, and that such maximum would apply only to daily passengers making round trip use of that line six days of every week of the entire year. Moreover, appellant showed before the Commission that such maximum increase would apply to not more, and probably to substantially less, than 45 per cent. of all passengers using appellant's downtown line.

Obviously the maximum increases under the 9 cent fare of the downtown line authorized by the Commission's order of June 8, 1943, or under the alternative fares of 11 tokens for $1 or a cash fare of a dime authorized by the Commission's order of November 2, 1943, would be proportionately less. Furthermore, since the Commission's order of November 2, 1943 required such alternative fares to be made applicable also to appellant's uptown line, on which the authorized and existing fare is now 10 cents, the cost of living of passengers using appellant's uptown line would, under that order, be proportionately reduced in the direct ratio to which they availed themselves of the right to buy tokens sold at 11 for $1 instead of paying a cash fare of a dime.

In addition, however, appellant pointed out to the Commission that primarily, at least, an increase in passenger fares, unlike an increase in freight rates, is deflationary instead of inflationary, since it takes money out of the commodity market and cannot, like increased freight rates, be added to commodity prices.

Appellant pointed out that increased passenger fares could only have an inflationary result if their purpose and actual effect were (a) to permit payment of further increases in wages to the carrier's employees; (b) to permit

the carrier to pay competitively higher prices to secure limited materials; (c) to permit the carrier to pay dividends on stock not theretofore paid; (d) to permit the carrier to pay interest on its bonded indebtedness to an extent not theretofore currently paid; (e) to increase the living costs of the carrier's passengers to a point which, and under circumstances such as, would require a general increase in the wages of such passengers.

In connection with the foregoing, appellant pointed out that the purpose and effect of its proposed increased fares was not to permit further increased wages, but to meet increases already granted; that it could not pay competitively higher prices for limited materials because of ceilings fixed by the Price Administrator; that it could not pay any dividends on its stock until it first paid off approximately 5½ million dollars of cumulative and unpaid interest on its Adjustment Income Bonds; that it had always paid and was now paying full interest on its First Mortgage and First and Refunding bonds; that even if it were able to pay the full 5% interest on its Adjustment Income Bonds, the additional payment on such bonds over the average interest now paid, distributed among the 5,300 holders of them, would amount to something less than $100 per year.

Finally, appellant pointed out that such increased fares could not possibly result in such increased living costs to its passengers as would require a general increase in the wages of such passengers; first, because there is no known basis of wages, per hour, per day, per week, or per month, which would require or permit the reflection of a maximum increase of living cost of $12.48 a year; second, because there was no evidence as to how many of appellant's pas-

sengers were wage earners, or if they were, in what manner they were concentrated or diffused among industries and wage groups.

Here, perhaps, is as good a place as any to dispose of the second ground upon which the District Court undertook to justify its injunction against appellant's increased fares authorized by the Commission's enjoined orders. That ground, as already noted, is that the Commission too "lightly brushed aside" the Price Administrator's contentions that the Commission's orders granting such increased fares violated the national emergency policy of economic stabilization.

In spite of the failure of the Price Administrator to offer any evidence whatever in this respect, of his concession that appellant's increased fares could not themselves result in inflation, and of appellant's affirmative showing that they could not possibly do so, the Commission nevertheless gave detailed and lengthy consideration to the Price Administrator's contention that such increased fares in connection with other increased living costs might result in an "inflationary spiral".[1] Moreover the Commission did so although, obviously, such other increased living costs were in the control of the Price Administrator himself, and increases permitted in them and not the increases in appellant's fares would be responsible for any "inflationary spiral".

In both of its enjoined reports the Commission reached the conclusion that the increased fares which it authorized

---

[1]See report of June 8, 1943 (R. 248-272) at R. 265-267, 270-271, and report of November 2, 1943 (R. 272-285) at R. 282-283.

could not result in inflation or increased cost of living, in contravention either of the Emergency Price Control Act or of the Inflation Control Act. There being ample evidence to support the Commission's finding in these respects, and no evidence whatever to the contrary, it is submitted that the second ground on which the District Court enjoined the Commission's orders is wholly frivolous.

V

THE COMMISSION'S ORDERS OF JUNE 8, 1943, AND NOVEMBER 2, 1943, ARE FULLY SUPPORTED BY THE FINDINGS OF THE COMMISSION WHICH, IN TURN, ARE FULLY SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

This Court has held repeatedly that, in reviewing an order of the Interstate Commerce Commission, a court has no authority to consider the weight of the evidence, the soundness of the Commission's reasoning, or the wisdom of its action,[1] and that a court may not substitute its judgment for the findings and conclusions of the Commission.[2] The sole function of the court is to determine whether the Commission in making the order acted within its power,[3] whether there was any substantial evidence to support its basic find-

---

[1] *Virginian Ry. Co. v. United States*, 272 U. S. 658, 666; *Western Chemical Co.* v. *United States*, 271 U. S. 268, 271.

[2] *United States* v. *New River Co.*, 265 U. S. 533, 542.

[3] *Interstate Commerce Commission* v. *Union Pacific R. Co.* 222 U. S. 541, 546, 547-548.

ings,[1] and whether it made the findings requisite to support its order,[2]

The proceedings before the Commission in 1942 and 1943 which led up to the entry of the two orders herein enjoined were a reopening of the proceedings before the Commission in 1937 which had led up to the Commission's order of July 11, 1938, approving a fare of 8 cents on the appellant's downtown line. The order of July 11, 1938 was entered after a full and elaborate hearing, at which more than a score of witnesses were heard, and more than a hundred exhibits were received in evidence.[3] The Commission had before it in the 1937 proceedings, among other relevant facts, evidence describing the service rendered by the appellant, the costs of the appellant's railroad properties, the appellant's operating expenses and revenues from 1919 to 1937, statistics showing the total number of passengers carried by the appellant in each year since 1919 on the uptown line, on the downtown line and under joint arrangements with other carriers, a comparison of these statistics with similar statistics for the principal trunk-line railroads reaching New York City by way of New Jersey, and a mass of data as to the fares on the New York City subways, the bus fares over the George Washington Bridge and through

---

[1] *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 92.

[2] *Florida* v. *United States*, 282 U. S. 194, 215; *Hudson & Manhattan Railroad Co.* v. *United States et al.*, 313 U. S. 98.

[3] The hearings occupied all or part of six separate days (including one evening session), and the testimony and argument required 1010 typewritten pages of transcript. See transcript of record to this Court in *Hudson & Manhattan Railroad Company* v. *The United States of America et al*, October Term 1940, No. 628, at R. 195-886.

the Hudson Tunnels, the commutation fares of the trunk-line railroads, and the fares on the ferries.[1]

At the hearings in 1942, the record of the 1937 proceedings was brought up to date, and much new evidence, relating primarily to changes in conditions between 1937 and 1942, was adduced. Again various witnesses were called on behalf of the appellant railroad company and on behalf of the protestants, and approximately one hundred supplemental or additional exhibits were received in evidence.[2] At the reopened hearings in September, 1943, further testimony was taken and some thirteen additional exhibits were received in evidence.[3]

The reports and orders herein enjoined contain a careful summary and analysis by the Commission of the evidence adduced before it which the Commission regarded as most important. It is evident from a mere reading of these detailed reports that, in the "mass of facts" of record before the Commission, there was "that out of which experts could have named a rate".[4] As this Court said in *Interstate Commerce Commission* v. *Union Pacific R. Co.*, "The law makes the Commission's finding on such facts conclusive."[5]

---

[1]Transcript of record to this Court in *Hudson & Manhattan Railroad Co.* v. *United States of America et al*, October Term 1940, No. 628.

[2]The hearings occupied all or part of eight separate days, and the testimony and argument required 1020 typewritten pages of transcript (Tr. 1011-2030). See stipulation with respect to printing of record (R. 417-433), at R. 420-431.

[3]The reopened hearings occupied two full days, and the testimony and argument required 445 typewritten pages of transcript (Tr. 2032-2477). See stipulation with respect to printing of record (R. 417-433), at R. 420, 431-433.

[4]*Interstate Commerce Commission* v. *Union Pacific R. Co.* 222 U. S. 541, 550.

[5]222 U. S. 541, 550.

A. The report and order of June 8, 1943.

The appellees did not seriously contend before the District Court that the basic findings which the Commission made in its report and order of June 8, 1943[1] were not supported by substantial evidence. Furthermore, and most significant, the District Court made no finding whatever that said order was not based on adequate findings or was without evidence to support it. On this state of the record, appellant could well rest upon the presumption of validity which attaches to an order of the Commission made after hearing and consideration.[2] However, in order that there may be no question as to the adequacy of the record on which the Commission entered its order of June 8, 1943, the basic findings of the Commission which support such order are briefly summarized below, and the evidence of record supporting such findings is indicated by footnotes.

(1) The Commission found that economic and competitive conditions affecting the appellant's traffic had changed materially since the Commission's report and order of July 11, 1938, in which it had concluded that the 10 cent fare then proposed on appellant's downtown line had not been justified but that a fare of 8 cents had been justified.[3] Among the material changes which the Commission found had occurred in the interim were:

(a) Appellant's total traffic had declined from 77,989,857 passengers in 1937 to 65,847,289 in 1941, or 15.57%, as a result of the continuance of the economic depression, increased competition of private automobiles

[1]R. 248-272.

[2]*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602.

[3]R. 268.

and motor buses using the George Washington Bridge and the Lincoln and Holland Tunnels, and later the closing of the 33rd Street Station on appellant's uptown line between December 25, 1937 and September 24, 1939, necessitated by the construction by the City of New York of its Sixth Avenue subway line.[1]

(b) The accrued and unpaid interest due on appellant's Adjustment Income Bonds had increased to $5,494,727 at December 31, 1941 (as compared with $2,118,746 as at December 31, 1937.)[2]

(c) Appellant's total operating expenses had increased in 1941 over 1937 by about $205,000, or 6.3%, primarily because of increased labor costs and taxes, although the number of car miles was reduced by 5.27%.[3]

(d) Aside from contingent increases in operating costs for materials, supplies and taxes due to the war, appellant's estimated annual operating costs for labor and for a reserve against war hazards (found by the Commission to be reasonable) will aggregate at least $466,500 per year in excess of such costs in 1941.[4]

(e) While appellant's traffic, both on its downtown line and as a whole, decreased between 1937 and 1941, war conditions have caused, and continue to cause, a steadily mounting increase of traffic.[5]

---

[1]Finding, R. 254; evidence: Tr. 1133-6, 1154, 1164, 1168-71, 1347; Tr. Exs. 5-R, 36-R.

[2]Finding, R. 251; evidence: Tr. 1140; Tr. Exs. 26-R, 26-R Supp.

[3]Finding, R. 254; evidence: Tr. 1137-9, 1178-80; Tr. Ex. B.

[4]Finding, R. 255, 267; evidence: Tr. 1261-5, 1326-7.

[5]Finding, R. 254-255; evidence: Tr. 1141-4, 1185-7, 1458-9, 1462, 1815; Tr. Exs. A, A Supp., C.

(f) The conditions which the Commission found had motivated the decline in appellant's traffic prior to 1938 have been materially changed by the incidence of war conditions.[1]

(g) The two factors which tended to increase the possibilities of diversion when appellant's downtown fare was increased from 6 cents to 8 cents have been eliminated. The possibility of direct bus service between metropolitan New Jersey and downtown Manhattan was eliminated by the decision of the Commission in *New Jersey-New York Bus Applications*, 23 M. C. C. 219, denying applications for certificates to inaugurate such service. The curtailment of private car competition, due to war conditions, eliminated possible diversion to this means of transportation.[2]

(2) The Commission found that the capital securities of appellant outstanding as of August 31, 1942, and allocable to its railroad properties were $50,889,418 of funded debt and $37,557,459 of stock. Such funded debt consisted of $783,520 of First Mortgage 4½% Bonds, $26,572,948 of First Lien and Refunding 5% Bonds, and $23,542,950 of Adjustment Income 5% Bonds.[3]

(3) The Commission found that the cost of appellant's railroad properties, less retirements, as of August 31, 1942, was $66,541,352, and that the reproduction cost of its rail-

---

[1]Finding, R. 254-255; evidence: Tr. 1141-4.

[2]Finding, R. 257; evidence: Tr. 1141, 1259-60, 1280-2, 1815.

[3]Finding, R. 251; evidence: Tr. 1035, 1037; Tr. Exs. 26-R 26-R Supp.

road properties new, on the basis of 1914 prices, less depreciation, had been about $68,273,000 in 1937.[1]

(4) The Commission found that since 1932 appellant had failed to earn its bond interest by amounts which varied from $279,078 in 1934 to $655,164 in 1937, $1,113,350 in 1938, $806,848 in 1939, $817,424 in 1940 and $892,148 in 1941. The accumulated and unpaid interest on appellant's Adjustment Income Bonds as of December 31, 1941, was $5,494,727.[2]

(5) The Commission found that appellant had paid no dividends on its stock since 1933 and that under the provisions of its Adjustment Income Mortgage no dividends can be paid until all current and accumulated interest on its Adjustment Income Bonds has been paid.[3]

(6) The Commission found that in the period from 1919 to 1942, the outstanding securities of appellant allocable to its railroad properties had been reduced in net amount by $17,674,356 (largely through the purchase of its own bonds at heavy discounts, through the application of funded reserves), and that appellant had thereby effected a total saving of $6,495,696 and future savings at the rate of $427,000 per annum in interest charges.[4]

(7) The Commission found that, under a 9 cent fare on appellant's downtown line (assuming an increase over 1941

---

[1]Finding, R. 252; evidence: Tr. 224-7, 1035; Tr. Exs. 25-R, 31.

[2]Finding, R. 251; evidence: Tr. 1139-40; Tr. Exs. 26-R, 26-R Supp.

[3]Finding, R. 251; evidence: Tr. 397, 1274; Tr. Exs. 26, 26-R, 28, 28-R.

[4]Finding, R. 252; evidence: Tr. 1140, 1833-55; Tr. Ex. 26-R.

on downtown local traffic due to the war of 12.67%, a 5% diversion of such traffic by reason of the increase in the fare, and making allowance for reduced out of pocket expenses because of such diversion), appellant's resulting net income available for bond interest would approximate $2,404,502 (which is $186,552 *less* than full interest on appellant's Adjustment Income Bonds).[1]

(8) The Commission found that in order to meet increased operating expenses and the interest on its bonds, the appellant was in need of additional revenue beyond that which might be expected from its present fares and divisions, and that a portion of such additional revenue should be obtained by increasing the fare on its downtown line from 8 cents to 9 cents, during the remaining period of the war and for six months after its termination.[2]

(9) The Commission found that appellant would have had the right, by reason of the Commission's decision in *Ex Parte 148,* to increase the fare on its downtown line from 8 cents to 9 cents, and that, since appellant had been affected by the same conditions making for higher operating expenses as the Commission had taken into account in authorizing a general increase in railroad passenger fares, the 9 cent fare on the downtown line authorized by the Commission was consistent with its decision in *Ex Parte 148.*[3]

---

[1]Finding, R. 269; evidence: Tr. 1132, 1137-9, 1152-88, 1195-6, 1249, 1261-5, 1653-4; Tr. Exs. 26-R, 26-R Supp., 30-R, 30-R Supp. sh. 3, 36-R, 36-R Supp., A, A Supp., B, G.

[2]Finding, R. 271; evidence: Tr. 1181-3, 1195-6, 1261-9, 1274, 1282-3; Tr. Ex. G.

[3]Finding, R. 250, 256, 270; evidence: Tr. 1119-20, 1121-32; *Increased Railway Rates, Fares, and Charges,* 1942, 248 I. C. C. 545.

(10) The Commission found that the increase in fare on the downtown line from 8 cents to 9 cents would not have any inflationary effect and would not be in conflict with the National Emergency Price Control Act of 1942, as amended.[1]

B. The report and order of November 2, 1943.

As in the case of the order of June 8, 1943, the District Court made no finding whatever that the Commission's order of November 2, 1943, was not based on adequate findings or was without evidence to support such findings. Again, in order that there may be no question as to the adequacy of the record on which the Commission entered its order of November 2, 1943, the evidence of record supporting the Commission's findings is briefly summarized below, under the basic findings made by the Commission.

"1. It is impracticable for respondent to collect a cash fare of 9 cents."[2]

There is no conflict in the evidence or real dispute between the parties as to appellant's inability to collect and count a 9 cent cash fare with its present fare collection boxes or with any other known fare collection mechanism. The testimony of Mr. Brown, Chairman of the Board and President of the appellant, and of Mr. Nahm, representing the manufacturer of the fare collection boxes, is practically uncontroverted on this point.[3]

The only objection which the appellees made to the finding of the Commission as to the impracticability of col-

[1]Finding, R. 270-271; evidence: Tr. 1556-7, R. 376-379, H. & M. Ex. D-10.
[2]R. 276-277.
[3]Tr. 2039-41; 2234-7.

lecting a 9 cent cash fare was the contention of Jersey City that the Commission disregarded evidence that the 9 cent cash fare could be collected by removing the coin-counting mechanism from the collection boxes.[1] Far from disregarding this possibility, the Commission in its report of November 2, 1943, expressly found:

> "The counting mechanism of these boxes is indispensible to the efficient operation of respondent's railroad, first, so as to provide a check on the efficiency of the fare-box attendant in observing the deposit of the fares; second, to provide a check against the subsequent count of the fares in respondent's coin-counting room; third, to prevent the necessity of an impracticable guarding of the sealed coin-collection cans between the time they are removed from the fare boxes and the time they are received in the counting room; and fourth, to provide the railroad with the traffic check necessary to control its train schedules and service by determining the volume of the incoming traffic during typical periods and thus make available the data essential to the control of train operations."[2]

This finding is amply supported by the record.[3]

Since the practicability of removing the counting mechanism from the collection boxes was clearly a question of fact for the Commission to determine, and since the finding of the Commission on this point is fully supported by the evidence, the appellees cannot obtain a review of said finding in this Court.

---

[1] See paragraph 27 of Jersey City's amended complaint, R. 37.
[2] R. 277.
[3] Tr. 2318-21; 2328-32.

"2. There is available to respondent no practicable method of collecting a fare of, or approximating, 9 cents except by the use of tokens."[1]

Mr. Brown and Mr. Van Gieson, General Superintendent of the appellant, testified in detail as to the investigation made by them before reaching the conclusion that the only feasible method of substantial compliance with the Commission's authorization of a 9 cent fare on appellant's downtown line was by the use of alternative fares of 11 tokens for $1 or a cash fare of a dime.[2] Based on such evidence, the Commission made the following findings as to the impossibility of collecting a 9 cent fare by any other method:

> "Other methods of collecting a fare of 9 cents considered and rejected by respondent were the following: (a) By requiring the passenger to deposit initially a dime and to receive a contemporaneous refund of 1 cent from the fare-box attendant. The attendant, at least during the peak-traffic periods, could not watch the coins drop into the fare box and at the same time make change. Such attendants, the number of which would have to be at least doubled, would have to be furnished with about 125,000 pennies each business day. The attendants could not be certain that the penny refund would not be made to the uptown as well as the downtown passengers.
>
> "(b) By the use of weekly or monthly passes or commutation tickets. Such passes or tickets could not be policed during the rush hours, and their attempted inspection by station attendants would entail too much delay to passengers.

[1]R. 277.
[2]Tr. 2042-48; 2288-2317.

"(c) By the use of single-trip or multiple-trip tickets. The fare boxes are not adapted to effect the necessary cancellation of such tickets, and cancellation machinery cannot be obtained under the present war conditions. Other rapid-transit companies in the New York area have abandoned the use of such tickets because there are means by which cancellations can be eradicated and the tickets reused, such strips as deposited by groups of passengers may be abstracted from the box by the attendant, and when tickets are sold in strips they may be torn short by the purchaser so as to provide more tickets than were sold. Moreover, the sale of single tickets, with the necessity for making change, would result in serious congestion and delays to passengers during the peak-traffic periods."[1]

These findings, being supported by evidence, are not subject to review by this Court.

"3. The use of tokens only for the local downtown traffic, while contemporaneously using cash fares for the other local traffic of respondent, is impracticable."[2]

This finding is based upon evidence showing that, when a passenger enters a station in New Jersey, it is impossible for appellant to determine whether such passenger intends to use its uptown or its downtown line. Any passenger would therefore be able to enter a New Jersey station by depositing a token. If appellant should retain its present 10 cent fare on its uptown line as its only fare on such line, it would also have to retain its present facilities for collecting on exit at uptown stations the 1 cent balance of such

[1]R. 277-278.

[2]R. 278. See also report of August 3, 1943 (R. 313-326) at R. 316-317.

10 cent fare. An additional complication would be presented if a passenger intending to use the uptown line instead of depositing a token at New Jersey stations should deposit a dime. The appellant then would have to issue to such passenger an exit coupon which would permit him to leave a station on its uptown line without payment of an additional fare, or would have to refund him 1 cent which he would have then to surrender on exit at an uptown station. Either method would require such passenger to indicate to the fare collection box attendant at the New Jersey station that he was depositing a dime and not a token and was therefore entitled to an exit coupon or to a refund of 1 cent. This would necessarily retard the entrance of other passengers at such fare collection box. Moreover, it would be extremely difficult to police the proper issuance and use of such free exit coupons or the making of such 1 cent refunds. The appellant would thus not only risk the loss of substantial revenue but would have to retain its present exit fare facilities and attendants at uptown stations and provide augmented station forces to handle the sale of tokens.[1]

"4. The use of an alternative-fare basis of 11 tokens for $1 or a cash fare of a dime for local interstate passengers on both the downtown and uptown lines is the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings and conclusions in the second report as necessary to insure adequate transportation service."[2]

Having found that the appellant could not collect a 9 cent cash fare by the use of its present fare-collection

[1]Tr. 2042-48; 2288-2317.
[2]R. 278-282.

method or by the use of any other practicable method, the Commission found that the alternative dime and token fare, applicable both to the uptown and downtown lines of the appellant, was the only practicable method which would produce the additional revenue to be accorded by its June 8, 1943 order. In its report and findings of June 8, 1943, the Commission had found that the increase in the downtown fare to 9 cents thereby authorized would not provide the appellant with net income sufficient to pay full interest on its Adjustment Income Bonds.[1] In fact, the net income which the Commission estimated a 9 cent fare would produce would fall $186,552 short of the amount required for that purpose.[1] In its report and findings of November 2, 1943, the Commission found that the proposed alternative token and dime fares could be expected to bring to the appellant at least *no greater gross or net revenue* than would result from cash fares of 10 cents on the uptown line and 9 cents on the downtown line, if both such fares were collectible.[2]

The evidence of record fully supports the foregoing findings.[3] The only counter evidence offered by any party at the hearings of September 28 and September 29, 1943, was the statistical evidence comprised by Exhibit F-142,[4] presented by the Price Administrator, and the testimony of his witness, Mr. David A. Kosh, with reference thereto.[5] That exhibit and testimony were directed solely to an effort to refute the appellant's estimate that 90% of its passengers would avail themselves of the lower token fare of 9¼1

[1]R. 269.
[2]R. 279.
[3]Tr. 2048-55; 2133; 2210-11; 2383-4; Tr. Exs. F-147, F-148, F-149, F-150.
[4]Report for 1937 of Committee on Fare Structures of the American Transit Association, Tr. Ex. F-142.
[5]Tr. 2424-41.

cents per ride and that 10% would pay the higher cash fare of a dime, which estimate the Commission had stated in its report of August 3, 1943, might be accepted as reasonable.[1]

The Commission's report of November 2, 1943, discusses the evidence on this point in some detail,[2] and clearly indicates the weight accorded by the Commission to all such evidence. After analyzing, weighing and considering the evidence, the Commission concluded in its report that:

> "Even if the actual use ratio under the proposed basis should prove to be 70 percent tokens and 30 percent dimes, respondent's revenue would, within about $15,000, approximate that anticipated by our findings in the second report, based upon the number of local interstate passengers carried in the first 8 months of 1943, adjusted to a 12-month basis, and allowing for a 5 percent diversion by reason of the fare increase on the downtown line, but making no allowance for the increased number of passengers which could be expected to be drawn to the uptown line by reason of the fare reduction thereon. Moreover, as indicated, it is likely that the traffic characteristics on the lines of respondent differ greatly from those on the lines of the other companies referred to of record, and therefore the 90-10 percent use ratio urged by respondent appears to us to be within the range of probable achievement under the proposed fare basis."[3]

The determination by the Commission of these questions of fact is not open to review by this Court.

Appellees urged before the District Court that the Commission had acted arbitrarily and capriciously in permitting

---

[1]R. 322.
[2]R. 279-282.
[3]R. 281-282.

an increase in fares on the downtown line, notwithstanding appellant's failure to heed the "directive" of the Commission to obtain additional revenue from the Pennsylvania Railroad through increased divisions on interline traffic. The parties went into this question thoroughly before the Commission, both at the hearings and at the oral argument. There, as before the District Court, appellees argued that the suggestion of the Commission in its report of July 11, 1938, that

> "If respondent should feel impelled to seek a further increase in revenue, it should consider doing so on interline traffic",[1]

was a mandatory "directive" by the Commission, which this Court had upheld in *Hudson & Manhattan Railroad Company* v. *United States, et al.*, 313 U. S. 98.

At the hearings before the Commission, appellant introduced extensive testimony to the effect that the continuance of the 8 cent fare on the downtown line presented a practical obstacle to obtaining higher divisions from the Pennsylvania Railroad on the joint service, and showing the impossibility, in any event, of meeting the entire revenue needs of the appellant through any increased divisions that might reasonably be expected.[2] In this connection, the Commission's report, findings and order of June 8, 1943, after finding that the appellant was in need of additional revenue beyond that which might be expected from its present fares and divisions, expressly found that "a portion of such additional revenue can reasonably, and

---

[1]R. 311.

[2]Tr. 1269-73; 1286-1313.

should, be obtained by increasing its downtown fare from 8 to 9 cents."[1] This finding clearly contemplated that the appellant should obtain the remaining "portion of such additional revenue" from increased divisions on interline traffic, and the appellant has indicated to the Commission that it intends to seek such increased divisions and has had preliminary talks on the subject with representatives of the Pennsylvania Railroad.[2] If there is any question of fact in this case upon which the Commission has the last word, it is the proper construction of its own suggestion regarding increased revenue from interline traffic, and the extent to which it will require compliance with that suggestion before an increase in fare will be authorized. As the Commission's decision to authorize the increase without requiring compliance with its suggestion is supported by evidence, no review of that decision can be had in this Court.

Appellees also urged before the District Court that the Commission had acted arbitrarily and in disregard of the evidence by permitting an increased burden upon appellant's downtown passengers, notwithstanding the Commission's previous statements to the effect "that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers." As pointed out above, the Commission did not in fact authorize "the entire burden of the revenue increase" to be borne by the downtown local passengers. The Commission's findings in its report and order of November 2, 1943, that the proposed alternative token and dime fares could be expected to yield no greater

[1]R. 271.
[2]Tr. 1309; 2074; 2105-14.

gross or net revenue than would result from cash fares of 10 cents uptown and 9 cents downtown (which fares the Commission had found would not yield net income sufficient to pay full interest on appellant's Adjustment Income Bonds) makes it clear that, even after the alternative dime and token fares go into effect, there still will remain a substantial portion of the revenue increase to which the appellant is entitled which must be sought from sources other than its downtown traffic, including increased divisions on the interline traffic.

"5. The modification of our prior findings as made in the third report of August 3, 1943, is not in conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act."[1]

We have pointed out above that neither of the appellees introduced or offered to introduce any evidence with respect to the possible inflationary effect of an increase in the fare on the appellant's downtown line, although afforded ample opportunity to do so. Despite the complete lack of any evidence on this point, the Commission nevertheless gave careful consideration to the argumentative contentions of the Price Administrator that the proposed increase in fare would conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act. The reports of June 8, 1943 and November 2, 1943 both show that the Commission gave careful consideration to the purposes of the stabilization legislation, and reached the conclusion on the record before it that the proposed fare increase would

[1]R. 282-283.

not conflict with such legislation.[1] Even though this Court might decide that it would have reached a different determination on the same facts, it cannot substitute its judgment for the judgment of the Commission.

"6. A cash fare of 10 cents for the occasional or irregular passenger on the downtown line compares favorably with the reasonable charge made for similar service on railroads generally."[2]

In this connection, the Commission made it clear that when it authorized a 9 cent fare by its order of June 8, 1943, it was concerned primarily with fares to be paid by appellant's regular daily patrons.[3] The practice of charging occasional passengers higher fares than those paid by regular passengers is, of course, the rule, rather than the exception, among carriers. As the Commission points out in its report of November 2, 1943, a minimum fare of 10 cents is the fare prescribed by the Commission for railroads generally for passengers who ride only occasionally in commutation equipment.[4] The Commission's determination that a 10 cent fare for the occasional passenger on appellant's lines is a reasonable charge is supported by the evidence of record.[5]

The appellees urged before the District Court that the Commission had acted arbitrarily and capriciously in prescribing the same fares for both the uptown and downtown

[1]R. 265-267, 270-271, 282-283.
[2]R. 283.
[3]R. 283, 323.
[4]R. 283.
[5]Tr. Exs. 36-R, G, F-102.

lines, in disregard of the previous "findings" of the Commission and of this Court "on precisely the same factual situation". The fact is, of course, that in its prior decision this Court did not purport to pass upon the proper relationships between fares on appellant's uptown and downtown lines; all this Court held was that, since there was evidence to support the Commission's findings and its findings supported its 1938 order, the Commission's order should be affirmed. The only finding which the Commission made in 1938 was that 10 cents was a maximum reasonable fare on the uptown line *at that time*. In its reports, findings and orders of June 8, 1943, and August 3, 1943, the Commission held that, in view of the 10% general fare increase authorized in *Ex parte 148* by reason of increased operating expenses, to which appellant had also been subjected, the maximum reasonable fare on the uptown line is now 11 cents.[1] No one could contend that the 9⅟11 cent token fare on the uptown line, which is less than the maximum reasonable fare on that line, is an unreasonable fare. As the 9⅟11 cent token fare on the downtown line authorized by the order of November 2, 1943, also is less than the 11 cent maximum reasonable fare on the uptown line, such token fare on the downtown line is, therefore, still a reasonable fare within the meaning of the Commission's statement in 1938.

CONCLUSION

We have shown in this brief that the Commission, as the expert body charged by the Congress with prescribing just and reasonable fares for appellant's railroad, concluded

---

[1] R. 256, 320-321, 323.

in its report of June 8, 1943, after extensive hearings, that appellant was in need of additional revenue, and that a portion of such additional revenue should be obtained by increasing the fare on its downtown line from 8 cents to 9 cents during the remaining period of the war and for six months after its termination. We have also shown that the Commission in its further report of November 2, 1943, after a further hearing limited to the only relevant issue, modified its prior order to the extent of permitting appellant to charge alternative fares of 11 tokens for $1 or a cash fare of a dime on its downtown line, provided that such alternative fares were also made applicable to appellant's uptown line, as the only practicable method by which appellant could reasonably be expected to obtain the increased revenues contemplated by the Commission's prior report. In so doing the Commission, well aware of the fact that its order was "not an order for all time",[1] frankly acknowledged in its report of November 2, 1943 that

> "The only way, of course, in which the effect of the proposed fare basis, either upon the public in convenience of use or upon the respondent in revenue results, can be ascertained without the uncertainties necessarily inherent in predictions of traffic or revenue results, is by giving the basis a fair trial."[2]

We have further shown that appellees were unwilling to permit a fair trial to be given to the alternative fares which had been approved by the Commission, and that instead they rushed into the District Court and succeeded in

---

[1] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 615. See *Acker* v. *United States*, 298 U. S. 426, 433.
[2] R. 282.

obtaining an injunction against the Commission's orders, despite the fact that such orders were based on adequate findings supported by substantial evidence.

The essential issue which this case presents to this Court is whether the Commission shall be permitted to exercise the regulatory functions entrusted to it by the Congress, without unwarranted interference by the courts with its administrative discretion. We submit that on the record herein both the appellant and the Commission are entitled to a fair trial of the proposed fares which the Commission has found to be reasonable, and that to this end this Court should reverse the order of the District Court.

Respectfully submitted,

JOHN F. FINERTY,
Counsel for Appellant
Hudson & Manhattan Railroad Company.

JOHN E. BUCK,
THOMAS A. HALLERAN,
CRAVATH, SWAINE & MOORE,
Of Counsel.

APPENDIX 1

INTERSTATE COMMERCE ACT, Sections 1(1), 1(5)(a), 15a (49 U. S. C., Secs. 1, 15, 15a):

SECTION 1(1) *"Carriers subject to regulation.* The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *"

SECTION 1(5) *"Just and reasonable charges required; classification of messages, and rates; exchange of services.* (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

SECTION 15a *"Fair return for carriers.* (1) When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto."

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. * * *"

Appendix 1

EMERGENCY PRICE CONTROL ACT OF 1942, 56 STAT. 23:

SECTION 1(a)(50 U. S. C. App., Supp. II, §901(a)):

"It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *"

SECTION 302(c) (50 U. S. C. App., Supp. II, §942(c)):

"* * * *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) com-

pensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility * * *."

INFLATION CONTROL ACT (STABILIZATION ACT) OF OCTOBER 2, 1942, 56 STAT. 765:

"That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

SECTION 2: "The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3(a) and 3(c), and clause (1) of section 302(c), of the Emergency Price Control Act of 1942 to the

extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof."

SECTION 7: "* * * (c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act."

INTERSTATE COMMERCE COMMISSION, GENERAL RULES OF PRACTICE:

"Rehearing; Reargument; or Reconsideration.

"Rule 101. *Petitions for rehearing, reargument, or reconsideration.*

"(a) *In General.* A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

"(b) *Rehearing or further hearing.* When in a petition filed under this rule opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

"(c) *Modification of effective date.* A petition under this rule seeking only modification of the effective date of a decision, order, or requirement, or in the period of notice, or other period or date prescribed therein, must be filed seasonably, except that, in case of

unforeseen emergency satisfactorily shown by petitioner, such relief may be sought informally, by telegram or otherwise, provided like notice is simultaneously communicated to all parties of record.

"(d) *Reconsideration.* If relief under this rule other than under subdivisions (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in rule 96(a), as should also any substitute finding or other substitute requirement desired by petitioner.

"(e) *Time for filing.* Except for good cause shown, and upon leave granted, petitions under this rule must be filed within 30 days after the date of service of a decision or order granting an application in whole or in part, and within 60 days after the date of service of any other character of decision or order.

"(f) *Successive petitions on same grounds, not entertained.* A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained."

APPENDIX 2

Description of Appellant's Railroad

Appellant is a common carrier by railroad, engaged in the transportation of passengers in interstate commerce, and is subject to the provisions of the Interstate Commerce Act, U. S. C., Title 49, Section 1, par (1) (R. 159-160).[1]

Appellant's railroad properties[2] consist of an underground rapid transit passenger railway, operated exclusively by electric power and furnishing transportation facilities between points in uptown and downtown New York City and points in Jersey City and Hoboken, New Jersey (R. 87). Appellant's railroad properties comprise about 8½ miles of railroad, of which all but about ½ mile is tunnel railroad underground (R. 87). A small scale map showing appellant's railroad properties appears opposite page 1 of this brief. Appellant's railroad properties include:

First. A line, which crosses under the Hudson River by two parallel tunnels between appellant's downtown terminal at Hudson Terminal, at Church Street (between Cortlandt and Fulton Streets), New York City, and appellant's station at the terminal of the Pennsylvania Railroad at Exchange Place, Jersey City, and extends west in Jersey

---

[1]Record references in this Appendix are to the printed Transcript of Record before this Court filed December 13, 1940, in the action entitled "Hudson & Manhattan Railroad Company, Appellant, v. The United States of America, Interstate Commerce Commission and the City of Jersey City, Appellees, October Term 1940, No. 628" which, pursuant to the stipulation between the parties (R. 417-433) is deemed to be before this Court on the present appeal.

[2]In addition to its railroad properties, appellant owns and operates two twenty-two story office buildings erected over its downtown railroad terminal in New York City and other miscellaneous real estate not employed in railroad operations. There is no dispute as to the propriety of the allocation of appellant's investment, bonded indebtedness and income as between its railroad properties and its non-railroad properties (R. 90, 95).

City from Exchange Place, through a station at Grove and Henderson Streets, to a station at Journal Square, Jersey City (R. 87, 160);

Second. A line which crosses under the Hudson River by two parallel tunnels between appellant's station, at the terminal of the Delaware, Lackawanna & Western Railroad, in Hoboken, and appellant's station at Christopher Street, New York City, and from the latter station extends uptown under Sixth Avenue (with stations at 9th, 14th, 19th and 23rd Streets) to appellant's terminal at 33rd Street and Sixth Avenue (R. 87, 16); and

Third. A north and south line on the New Jersey side of the Hudson River, approximately parallel with the River, and extending from a junction with said first mentioned line, at a point between appellant's Exchange Place Station and appellant's Grove and Henderson Streets station in Jersey City, to a junction with said second mentioned line, at a point near appellant's station in Hoboken, this line having a station at the terminal of the Erie Railroad in Jersey City (R. 87, 160-1).

Appellant operates its trains in two services known, respectively, as its downtown service or downtown line and as its uptown service or uptown line (R. 161).

On the downtown line the trains operate (a) between appellant's downtown terminal at Hudson Terminal, New York City, and appellant's station at Journal Square, Jersey City, with stops at appellant's stations at Exchange Place, Jersey City, and Grove and Henderson Streets, Jersey City, and (b) between appellant's downtown terminal at Hudson Terminal, New York City, and appellant's station at Hoboken, New Jersey, with stops at appellant's stations at Exchange Place, Jersey City, and Erie Station, Jersey City (R. 161).

On the uptown line the trains operate (a) between appellant's station at Hoboken, New Jersey, and appellant's uptown terminal on Sixth Avenue, New York City, with

stops at appellant's stations at Christopher Street, New York City, and at 9th, 14th, 19th and 23rd Streets, under Sixth Avenue, New York City, and (b) between appellant's station at Journal Square, Jersey City, and appellant's uptown terminal on Sixth Avenue with stops at appellant's stations at Grove and Henderson Streets, Jersey City, and Erie Station, Jersey City, and at appellant's stations at Christopher Street and at 9th, 14th, 19th and 23rd Streets under Sixth Avenue, New York City (R. 161).

Appellant also operates, in conjunction with the Pennsylvania Railroad, a joint rapid transit electric train service between appellant's downtown terminal at Hudson Terminal, New York City, and the station of the Pennsylvania Railroad at Newark, New Jersey. The trains in this joint service operate over the appellant's line between appellant's downtown terminal at Hudson Terminal, New York City, and appellant's station at Journal Square, Jersey City, and from that point over a line owned by the Pennsylvania Railroad to the latter's station at Newark, New Jersey. Joint service passengers to and from appellant's stations on appellant's uptown line may transfer to and from joint service trains at appellant's station at Journal Square, Jersey City (R. 87-8, 161-2).